[redacted]

(25,009)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 299.

CORNELIA SWEET, J. A. PRICE, MABEL H. PRICE, ET AL., PLAINTIFFS IN ERROR,

vs.

ELMER E. SCHOCK, AS TREASURER OF OKMULGEE COUNTY, STATE OF OKLAHOMA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1916.

* * * * * * *

a-4 In the Supreme Court of the State of Oklahoma.

No. 6410, Equity.

CORNELIA SWEET, J. A. PRICE, MABEL H. PRICE, C. ALMY, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, J. L. Newhouse, W. L. Merwine, Bessie Hill, R. L. Sartin, J. R. Schoy, Cora M. Smith and A. E. Carney, Plaintiffs in Error,

vs.

ELMER E. SCHOCK, as Treasurer of Okmulgee County, State of Oklahoma, and the Board of County Commissioners of Okmulgee County, State of Oklahoma, Defendants in Error.

Filed Oct. 28, 1915. William M. Franklin, Clerk.

Assignment of Errors.

Come now the plaintiffs in error, and each of them, and file the following Assignment of Errors, upon which they, and each of them, will rely on their prosecution of the writ of error in the above entitled cause from the decretal order and decree made by this Court on the 15th day of December, A. D., 1914, in the cause wherein Elmer E. Schock, as Treasurer of Okmulgee County, State of Oklahoma, and the Board of County Commissioners of Okmulgee County, State of Oklahoma, were plaintiffs in error, and Cornelia Sweet, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, J. L. Newhouse, W. L. Merwine, Bessie Hill, R. L. Sartain, J. R. Schoy, Cora M. Smith and A. E. Carney, were defendants in error, to-wit:

First.

The court erred in reversing, and not affirming, the judgment and final decree entered in the District Court for Okmulgee County, State of Oklahoma, on the 2nd day of February, A.D. 1914, from which judgment and final decree the appeal was prosecuted by the above named Elmer E. Schock, as Treasurer of Okmulgee County, State of Oklahoma, et. al. vs. Cornelia Sweet, et al.

Second.

The court erred in not making, rendering and entering a judg-
5 ment and decree in favor of the said Cornelia Sweet, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D.

Terry, Adeline Pell, J. L. Peacock, H. E. Smith, Cora M. Smith, J. P. Snook, J. L. Newhouse, W. L. Merwine, Bessie Hill, R. L. Sartain, J. R. Schoy and A. E. Carney, and against the said Elmer E. Schock, as Treasurer of Okmulgee County, State of Oklahoma, and the Board of County Commissioners of Okmulgee County, State of Oklahoma, affirming the judgment and decree rendered and entered in the District Court of Okmulgee County, State of Oklahoma, in said action.

Third.

That said judgment and decree is contrary to, and in violation of, the covenants contained in the Homestead patent dated April 23, 1904, from the Creek Nation, one of the Five Civilized Tribes of Indians, duly approved by the Hon. Secretary of the Interior of the United States, to the allottee, Sarah Smith, a Freedman citizen of said Creek Nation, and which convenant is in words and figures as follows, to-wit:

"Subject, however, to the conditions provided by said Act of Congress, and which conditions are that said lands shall be non taxable and inalienable and free from any incumbrance whatever for twenty-one years."

Fourth.

That said judgment and decree are contrary to, and in violation of the following provisions and covenants contained in Section 7 of the Original Creek Agreement, approved March 1, 1901 (31 Stat. L.861), to-wit:

"Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of the five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any encumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above * * *"

Fifth.

That said judgment and decree is contrary to, and in violation of, the following provisions and convenants contained in Section 16 of the Supplemental Creek Agreement, approved June 30, 6-12 1912 (32 Stat.L.500) to-wit:

"Each citizen shall select from his allotment forty acres of land or a quarter of a quarter section as a homestead, which shall be and remain nontaxable, inalienable, and free from any encumbrance whatever for twenty-one years from the date of the deed

therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

Sixth.

That the provisions of Section 19 of the Act of Congress of April 26, 1906 (34 Stat.L.137) relating to the Five Civilized Tribes of Indians, of which the Creek Nation is one of said Tribes, to-wit:

"That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee;"

and the provisions of Section 4 of the Act of Congress of May 27, 1908, (35 Stat.L.312) relating to said Five Civilized Tribes of Indians, to-wit:

"That all land from which restrictions have been or shall be removed shall be subject to taxation * * *"

are each and both contrary to, and in violation of, the 5th Amendment to the Constitution of the United States and contrary to, and in violation of, Article 1, Section 10, of said Constitution.

Seventh.

That said judgment and decree is contrary to, and in violation of, Article 2, Section 15, of the Constitution of the State of Oklahoma.

In order that the foregoing assignment of errors may be and appear of record, the said Cornelia Sweet, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, Cora M. Smith, J. P. Snook, J. L. Newhouse, W. L. Merwins, Bessie Hill, R. L. Sartain, J. R. Schoy and A. E. Garney, plaintiffs in error, present the same to the Court and pray that such disposition be made thereof as is in accordance with the laws and statutes of the United States in such cases made and provided, and they pray the reversal of the decretal order and decree of reversal entered in said cause by the said Supreme Court of the State of Oklahoma.

MERWINE & NEWHOUSE,
HERBERT C. SMITH,
Attorneys for Plaintiffs in Error.

* * * * * * *

13 In the Supreme Court of the State of Oklahoma.

No. 6410.

ELMER E. SCHOCK, as Treasurer of Okmulgee County, Oklahoma; and The Board of County Commissioners of Okmulgee County, State of Oklahoma, Plaintiffs in Error,

vs.

CORNELIA SWEET, J. A. PRICE, MABEL H. PRICE, COIT C. ALMA, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adaline Pell, J. L. Peacock, H. E. Smith, J. B. Snook, Cora M. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, R. L. Sartain, and Bessie Hill, Defendants in Error.

Filed May 15, 1914, W. H. L. Campbell, Clerk.

Petition in Error.

Come now the plaintiffs in error, Elmer E. Schock, as Treasurer of Okmulgee County, Oklahoma; and The Board of County Commissioners of Okmulgee County, State of Oklahoma, and Complain of the defendants in error, Cornelia Sweet, J. A. Price, Mabel H. Price, Coit C. Alma, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adaline Pell, J. L. Peacock, H. E. Smith, J. B. Snook, Cora M. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, R. L. Sartain, and Bessie Hill, for that said defendants in error, at the January term of the District Court of Okmulgee County, Oklahoma, on the 2nd day of February, 1914, of said term of court, recovered a judgment by the consideration of said court, against the said Elmer E. Schock, as Treasurer of said Okmulgee County, Oklahoma; and The Board of County Commissioners of Okmulgee County, State of Oklahoma, wherein they were defendants and the said above named defendants in error were plaintiffs, a certified transcript of the record of said court and the original case made, duly certified and attested is hereto attached, marked "Exhibit A", and made a part of this petition in error; and the said Elmer E. Schock, as treasurer of Okmulgee County, Oklahoma, and The Board of County Commissioners of Okmulgee County, Oklahoma, aver that there is error in said record and proceedings, in this, to wit:

14–18 1. That said court erred in overruling the motion of plaintiffs in error for a new trial.

2. That the court erred in not rendering judgment for the plaintiffs in error upon the agreed statement of facts submitted to the court as the evidence in the case.

3. That the court erred in overruling the demurrer of the plaintiffs in error to the petition of the defendants in error,

4. That the court erred in sustaining the demurrer of the defendants in error to the amended answer of the plaintiffs in error.

5. That the court erred in sustaining the demurrer of the defendants in error to the second paragraph of the first defense of the plaintiffs in error's amended answer, and to the second, third, fourth, fifth, sixth, seventh, and eighth defenses of the amended answer of the plaintiffs in error.

6. For errors of law occurring at the trial and duly excepted to by the plaintiffs in error.

7. For the reason that said judgment and decree is not sustained by the evidence but is contrary to the evidence.

8. That said judgment and decree is contrary to law.

9. That said judgment and decree should have been for the plaintiffs in error and not for the defendants in error.

Wherefore, the plaintiffs in error pray, that said judgment and decree so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiffs in error, and against the defendants in error, upon the statement of facts agreed upon and submitted to the court as the facts and evidence in said cause, and that the plaintiffs in error be restored to all rights that they have lost by the rendition of said judgment, and for such other and further relief as to the court may seem just.

ELMER E. SCHOCK,
As Treasurer of Okmulgee County, Oklahoma.
THE BOARD OF COUNTY COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA, *Plaintiffs in Error,*
By J. W. CHILDERS, *County Attorney.*
ORLANDO SWAIN,
Attorneys for Plaintiffs in Error.

19 In the District Court of Okmulgee County, State of Oklahoma

No. 2637.

CORNELIA SWEET, J. A. PRICE, MABEL H. PRICE, COIT C. ALMY, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, Cora M. Smith, J. P. Snook, J. L. Newhouse, W. L. Merwine, Bessie Hill, R. L. Sartain, J. R. Schoy, and A. E. Carney, Plaintiffs,
vs.
ELMER E. SCHOCK, as Treasurer of Okmulgee County, Oklahoma, Defendant.

Petition:

Come now the plaintiffs and for their cause of action herein, and for a cause of action for each thereof, against the said Elmer E. Schock, as treasurer of Okmulgee County, Oklahoma, allege and say:

(1) That on the 16th day of November, 1912, they filed their said application before the Honorable Board of Commissioners in and for Okmulgee County, Oklahoma, in which said application

they, and each of them, alleged that on the 23rd day of April, 1904, the Creek Nation of Indians, by P. Porter, its principal Chief, by deed of conveyance or patent conveyed unto one Sarah Smith a Freedman Citizen of said Nation, who had been placed on the final rolls of the Citizens and Freedmen of said Nation, the following real estate, situated in Okmulgee, Okmulgee County, State of Oklahoma, to wit:

Lot Three (3) of Section Seven (7), Township Thirteen (13) North, Range Thirteen (13) East, containing 41.82 acres, more or less, and said patent was duly approved by the Secretary of the Interior as required by law; that said property was conveyed to the said Sarah Smith as and for her homestead and was so desig-
20 nated in said conveyance, and said conveyance at the time of its execution and delivery contained the express provision that said real estate described in said deed should be non-taxable for twenty-one years from the date of said deed; that the said Sarah Smith on the 28th day of February, 1907, by deed of general warranty, conveyed the following described portion of said homestead land to one, Nathan Boyd, to wit:

Beginning at the Southwest corner of said Lot Three (3), Section Seven (7), Township Thirteen (13) North, Range Thirteen (13) East, thence East along the South line of said Lot Three (3) to a point about 399 feet West of the Southeast corner of said Lot Three (3) thence North to a point intersecting the North line of said Lot Three (3) 399 feet West of the Northeast corner of Lot Three (3), Thence West to the Northwest corner of said Lot Three (3) thence south along the West line of said Section seven (7) to the point of beginning, together with all the improvements thereon less 1.69 acres occupied as the right of way of the Ozark & Cherokee Central Railway Company, that on the 1st day of May, 1907, said Nathan Boyd, being the owner of said real estate, last described, caused said lands to be surveyed, plat-ed and laid out into blocks, lots, streets and alleys, as the Capital Heights Addition to the City of Okmulgee, Oklahoma, and filed and recorded the same and said addition is now a part of said City; that the said Sarah Smith, who was the owner of the remainer of said homestead, after taking out the real estate for said additions, caused said remainder of said real estate to be laid out, surveyed and plat-ed into blocks, streets, lots and alleys, as Capital Heights Second Addition to the City of Okmulgee, Oklahoma, and the same is now a part of said City. Said application further alleged that the lots thereinafter described in said application and owned by each of the plaintiffs herein passed to them by successive conveyances all in due form of law from the said Nathan Boyd and Sarah Smith, all of which conveyances were filed for rec-
ord and recorded; that each of the said lots in each of said
21 additions, belonging to said plaintiffs have been placed by the assessor for said county upon the tax duplicate of said Okmulgee County, Oklahoma, for taxation for the year 1912, for the value thereinafter set forth, and has levied a tax on each of said lots for said year as thereinafter set forth, and that said property of each of said persons is non-taxable and said levy of said taxes for

said year and all previous years is illegal and void, and said property should be stricken from the duplicate of said County, and said levy for said year 1912, should be set aside and cancelled by order of your Honorable Board. Said application further alleged that the following are the lots, the names of the owners, the valuation for taxation, the amount of the taxes charged for the year 1912, of the aforesaid persons, in Capital Heights Addition Number Two of said City.

Name.	Lot number.	Block.	Value	Tax.
Cornelia Sweet	One	12	$300.00	$11.78
Cornelia Sweet	Two	12	1500.00	58.88
J. L. Peacock	Six	12	250.00	9.81
J. L. Peacock	Seven	12	250.00	9.81
Adeline Pell	Ten	12	650.00	25.59
W. L. Merwine	Three	12	500.00	19.63
W. L. Merwine	Four	12	225.00	8.83
W. L. Merwine	Five	12	225.00	8.83
W. R. Alexander	Three	10	75.00	2.49
Walter Weimer	Ten	10	200.00	7.85
Walter Weimer	Eleven	10	200.00	7.85
Walter Weimer	Twelve	10	225.00	8.85
Bessie Hill	One	11	30.00	1.18
Bessie Hill	Two	11	30.00	1.18
Bessie Hill	Three	11	30.00	1.18
Bessie Hill	Four	11	30.00	1.18
Bessie Hill	Eleven	11	100.00	3.92
Bessie Hill	Twelve	11	100.00	3.92
Cora M. Smith	Twelve	9	579.00	22.56
J. P. Snook	Two	9	25.00	.99
J. P. Snook	Three	9	25.00	.99
J. P. Snook	Four	9	25.00	.99
J. P. Snook	Five	9	25.00	.99
J. P. Snook	Six	9	25.00	.99
J. P. Snook	Seven	9	100.00	3.92
J. P. Snook	Eight	9	100.00	3.92
J. P. Snook	Nine	9	275.00	10.79

Said application further alleged that the following are the lots, the names of the owners, the valuation for taxation, the amount of taxes charged for the year 1912, of the aforesaid persons, in
22 Capital Heights Addition aforesaid:

Name.	Lot number.	Block.	Value	Tax.
Bessie Hill	Two	8	$250.00	$9.81
Bessie Hill	Three	8	1050.00	41.21
R. L. Sartain	Fourteen	3	200.00	7.85
R. L. Sartain	Fifteen	3	600.00	23.55
J. R. Schoy	Five	5	1550.00	60.84
James C. Carney	Four	6	1550.00	60.84
Bertha D. Terry	Eighteen	3	250.00	9.81

Name.	Lot number.	Block.	Value	Tax.
Bertha D. Terry.....	Nineteen	3	450.00	17.65
H. E. Smith.....	Two	5	150.00	5.89
H E. Smith.....	Three	5	1500.00	58.88
Cora M. Smith.....	Two	5	150.00	5.89
Cora M. Smith.....	One	5	450.00	16.69
Grace A. Hall.....	One	6	1500.00	58.88
Grace A. Hall.....	Two	6	150.00	5.88
John T. Hall.....	Twenty-two	6	300.00	11.77
J. L. Newhouse.....	Six	4	1550.00	60.84
J. L. Newhouse.....	Five	4	300.00	11.77
Coit C. Almy.....	Two	6	150.00	5.89
Coit C. Almy.....	Three	6	1700.00	66.73
Coit C. Almy.....	Sixteen	7	175.00	6.86
Coit C. Almy.....	Eleven	8	800.00	31.40
J. A. Price.....	Seven	4	1500.00	58.80
J. A. Price.....	Eleven	3	500.00	19.63
J. A. Price.....	Eleven	5	275.00	10.79
J. A. Price.....	Twelve	5	300.00	11.78
Mabel H. Price.....	Six	6	750.00	29.45

Said application further alleged and prayed that the said several lots in each of said addition—be each stricken from the tax duplicate and each of the several sums levied against same for the year 1912, be cancelled and set aside and held for naught. Said application was supported by a proper affidavit in due form of law.

(2) That the plaintiffs are the owners of the said several lots described as above; that said Lots are assessed for taxation as alleged in said application and for the amounts therein alleged; that said lots and each thereof are non-taxable and are illegally placed upon the tax duplicate of the said County, that the said amounts charged against the same for taxation for said year are illegal; that notwithstanding that said plaintiffs have made their application as required by law, before the said Honorable Board of County Commissioners of said County and State, to strike said Lots above named and designated from the tax duplicate of said county and state, and have made their application in the method pointed out by law to have stricken from the books of said County the taxes, so
23 charged against them illegally, and notwithstanding the prayer of said application the said Treasurer of said County is proceeding to sell the lands and lots aforesaid for the payment of said illegal taxes, and he is placing or will place, pending the hearing and final determination of said proceedings a penalty of eighteen per cent. thereon, as provided by law for the collection of legal taxes, and he will sell said real estate and will collect said penalty, to the great and irreparable damage and injury of plaintiffs, unless restrained from so doing by proper order of this court. Wherefore plaintiffs pray that the said Treasurer of said County be enjoined from selling the said lots so designated and set forth above herein, and enjoined from placing a penalty on said lands or

taking any steps towards collecting said taxes while said proceedings before said Board of Commissioners are pending before said Board, or while the same may be pending in any court to which the same may be appealed, and that plaintiff- may have such other and further relief in the premises to which they may be entitled.

(Signed) MERWINE & NEWHOUSE,
Attorneys for Plaintiffs.

STATE OF OKLAHOMA,
Okmulgee County, ss:

Wellington L. Merwine being first duly sworn says that he is one of the plaintiffs in the above action; that the facts stated and alleged and contained in the above petition are true as he verily believes.

(Signed) WELLINGTON L. MERWINE.

Sworn to before me and subscribed in my presence on this 26 day of November, 1912.

[SEAL.] (Signed) ED NERN, *District Clerk.*

24–28 Indorsements: "No. 2637. In the District Court in Okmulgee County. Cornelia Sweet et al., Plaintiffs, vs. Elmer E. Schock, Defendant. Petition. State of Oklahoma, County of Okmulgee. Received and Filed Nov. 26, 1912. Ed Nern, Clerk of Dist. Court. Merwine & Newhouse, Okmulgee, Oklahoma, Attorney- for —.

* * * * * * *

29 And thereafter, to wit, on the 25th day of January, 1913, there was filed in said cause, in the office of the Clerk of the District Court of said County of Okmulgee, a transcript of the proceedings before the honorable Board of County Commissioners of Okmulgee County, Oklahoma, which said Transcript, together with all the endorsements thereon, is in words and figures following:

30 Before the Honorable Board of County Commissioners of Okmulgee County, State of Oklahoma.

Number 373.

In the Matter of the Taxation of the Property of CORNELIA SWEET, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, Cora M. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, A. E. Carney, R. L. Sartain, and Bessie Hill.

Transcript of the Proceedings Before the Honorable Board of County Commissioners of Okmulgee County, Oklahoma.

Be it remembered, that on the 15th day of November, 1912, there was filed in the office of the County Clerk in and for Okmulgee

County, State of Oklahoma, an application to take certain property from the tax duplicate of said County, supported by affidavit, a true copy of which, together with the endorsements thereon, is in the words and figures following, to wit:

"Before the Honorable Board of County Commissioners of Okmulgee County, State of Oklahoma.

In the Matter of the Taxation of the Property of CORNELIA SWEET, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, Cora M. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, A. E. Carney, R. L. Sartain, Bessie Hill.

Application for an Order Striking Certain Real Estate from Tax Duplicate and Remitting Certain Taxes.

Come now the said Cornelia Sweet, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, J. P. Snook, H. E. Smith, Cora M. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, A. E. Carney, R. L. Sartain, Bessie Hill, and represent to your Honorable Board as follows:

1 That on the 23rd day of April, 1904, the Creek Nation of Indians, by P. Porter, its Principal Chief, by deed of conveyance or patent, conveyed unto one Sarah Smith, a freedman citizen of said nation who had been placed on the final rolls of the Citizens and Freedmen of said Nation, the following real estate, situated in Okmulgee County, State of Oklahoma, to wit: Lot 3 of Section 7, Township 13 North, Range 13 East, containing 41.82 acres, more or less, and said patent was duly approved by the Secretary
31 of the Interior as required by law; that said property was conveyed to the said Sarah Smith as and for her homestead and was so designated in said conveyance, and said conveyance, at the time of its execution and delivery and now contained the express provision that said real estate described in said deed should be non-taxable for twenty-one years from the date of said deed; that the said Sarah Smith on the 28th day of February, 1907, by proper deed of conveyance transferred said homestead lands in part to one Nathan Boyd, as follows, to wit: Beginning at the Southwest corner of Lot 3 in Section 7, Township 13 North, Range 13 East, thence east along the south line of said Lot 3 to point about 399 feet west of the southeast corner of said Lot 3, thence north to a point intersecting the north line of said Lot 3, 399 feet west of the northeast corner of Lot 3, thence west to the northwest corner of Lot 3, thence south along the west line of Section 7 to the place of beginning, less 1.69 acres occupied as the right of way of the Ozark & Cherokee Central Railway; that on the first day of May, 1907, the said Nathan Boyd, being the owner of said real estate last described, caused said land last described to be surveyed, platted, and laid

out into blocks, lots, streets, and alleys as the Capital Heights' Addition to the City of Okmulgee, Oklahoma, and filed and recorded the same, and said addition is now a part of said city; that the said Sarah Smith who was the owner of the remainder of said homestead after taking out thereof the afore-said real estate for said addition, caused said remainder of said real estate to be laid out, surveyed, and platted into blocks, streets, lots, alleys as Capital Heights' Addition Number 2 to the City of Okmulgee, Oklahoma, and the same is now a part of said City; that the lots hereinafter designated and owned by the said Cornelia Sweet, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, Cora M. B. Smith, J. L. Newhouse, W. L. Merwine, J. P. Snook, J R. Schoy, A. E. Carney, R. L. Sartain, Bessie Hill in said additions, as hereinafter designated, passed to them by successive conveyances all in due form of law from the said Nathan Boyd and Sarah Smith, all of which conveyances were filed for record and recorded; that each of the lots belonging to said parties as aforesaid have been placed by the asse-sor for said County upon the tax duplicate of said Okmulgee County, Oklahoma, for taxation for the year 1912, for the values hereinafter set forth, and has levied a tax on each of said lots for said year as hereinafter set forth, and the same are placed upon the treasurer's book of said county for said year and said treasurer is attempting to collect the same according to the manner and the methods appointed by law and that said property of each of said persons is nontaxable and said levy of said taxes for said year and all previous years is illegal and void and said property should be stricken from the duplicates of said county and said levy for said year of 1912 should be set aside and cancelled by order of your Honorable Board.

The following are the lots, the names of the owners, the valuation for taxation, the amount of the tax charged for the year 1912, of the aforesaid persons in Capital Heights Addition No. 2.

Name.	Lot number.	Block.	Value	Tax.
Cornelia Sweet	One	12	$300.00	$11.78
Cornelia Sweet	Two	12	1500.00	58.88
J. L. Peacock	Six	12	250.00	9.81
J. L. Peacock	Seven	12	250.00	9.81
Adeline Pell	Ten	12	650.00	25.59
W. L. Merwine	Three	12	500.00	19.63
W. L. Merwine	Four	12	225.00	8.83
W. L. Merwine	Five	12	225.00	8.83
W. R. Alexander	Three	10	75.00	2.94
Walter Weimer	Ten	10	200.00	7.85
Walter Weimer	Eleven	10	200.00	7.85
Walter Weimer	Twelve	10	225.00	8.85

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Name.	Lot number.	Block.	Value	Tax.
Bessie Hill	One	11	$30.00	$1.18
Bessie Hill	Two	11	30.00	1.18
Bessie Hill	Three	11	30.00	1.18
Bessie Hill	Four	11	30.00	1.18
Bessie Hill	Eleven	11	100.00	3.92
Bessie Hill	Twelve	11	100.00	3.92
Cora M. Smith	One	9	25.00	.99
Cora M. Smith	Twelve	9	579.00	22.56
J. P. Snook	Two	9	25.00	.99
J. P. Snook	Three	9	25.00	.99
J. P. Snook	Three	9	25.00	.99
J. P. Snook	Four	9	25.00	.99
J. P. Snook	Five	9	25.00	.99
J. P. Snook	Six	9	25.00	.99
J. P. Snook	Seven	9	100.00	3.92
J. P. Snook	Eight	9	100.00	3.92
J. P. Snook	Nine	9	275.00	10.79

The following are the lots, the names of the owners, the valuation for taxation, the amount of taxes charged for the year 1912, of the aforesaid persons in Capital Heights Addition aforesaid:

Name.	Lot number.	Block.	Value	Tax.
Bessie Hill	Two	8	$250.00	$9.81
Bessie Hill	Three	8	1050.00	41.21
R. L. Sartain	Fourteen	3	200.00	7.85
R. L. Sartain	Fifteen	3	600.00	23.55
J. R. Schoy	Five	5	1550.00	60.84
James C. Carney	Four	6	1550.00	60.84
Bertha D. Terry	Eighteen	3	250.00	9.81
Bertha D. Terry	Nineteen	3	450.00	17.65
H. E. Smith S-½	Two	5	150.00	5.89
H. E. Smith	Three	5	1500.00	58.88
Cora M. Smith N-½	Two	5	150.00	5.89
Cora M. Smith	One	5	425.00	16.69
Grace A. Hall	One	6	1500.00	58.88
Grace A. Hall N-½	Two	6	150.00	5.89
John T. Hall	Twenty-two	6	300.00	11.77
J. L. Newhouse	Five	4	300.00	11.77
J. L. Newhouse	Six	4	1550.00	60.84
Coit C. Almy S-½	Two	6	150.00	5.89
Coit C. Almy	Three	6	1700.00	66.73
Coit C. Almy	Sixteen	7	175.00	6.86
Coit C. Almy	Eleven	8	800.00	31.40
J. A. Price	Seven	4	1500.00	58.80
J. A. Price	Eleven	3	500.00	19.63
J. A. Price	Eleven	5	275.00	10.79
J. A. Price	Twelve	5	300.00	11.78
Mabel H. Price	Six	6	750.00	29.45

Wherefore each of the parties hereto pray that the said several lots in said additions be each stricken from the tax duplicates and that each of the said several sums levied against the same for the year 1912 be cancelled and set aside and held for naught and for such other and further relief as is proper.

MERWINE & NEWHOUSE,
Their Attorneys.

STATE OF OKLAHOMA,
Okmulgee County, ss:

W. L. Merwine being first duly sworn says that he is one of parties to the foregoing action, and also one of the attorneys for each of the parties on whose behalf this application is made; that
33 he has examined the records of said county and from such examination in so far as the same affect the property under consideration, disclose the facts alleged and set forth in the above and foregoing application.

W. L. MERWINE.

Sworn to before me and subscribed in my presence this 15th day of November, 1912.

[SEAL.] H. E. SMITH,
Notary Public.

My commission expires July 18, 1915."

The following endorsement appears upon the back of said application, to wit:

"No. 373. Before the Honorable Board of County Commissioners, Okmulgee County, Oklahoma. In the matter of the taxation of the property of Cornelia Sweet and others. Application to take property from tax duplicate and to remit taxes. Filed November 15, 1912, County of Okmulgee, State of Oklahoma. Merwine & Newhouse, Attorneys of law. Reject J. W. Childers, County Attorney. Rejected Dec. 16, 1912, by order of the Board of County Commissioners, Okmulgee Co., Okla. Rejected this Dec. 16, 1912. By order of the Board of County Commissioners, Okmulgee Co., Okla. By Thomas Chism, Chairman."

The following entry now appears in Rebate Tax Record, Volume 1 at page 63, in the records of the decisions of the County Commissions upon application to take property from the tax duplicate and rebate taxes, to wit:

"373. Filed November 15th, 1912, passed upon December 16th 1912, Cornelia Sweet et al. Lots 3-7-13-13, 41.82 acres, freedman homestead rejected."

On the 4th day of January, 1913, there was filed in the office of the County Clerk of Okmulgee County, Oklahoma, the following notice of appeal, and service of notice on Board of County Commissioners, which was in the following words and figures, to wit:

"Before the Honorable Board of County Commissioners of Okmulgee County, State of Oklahoma.

In the Matter of the Taxation of the Property of Cornelia Sweet, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, Cora M. B. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, A. E. Carney, R. L. Sartain, and Bessie Hill.

34 *Notice of Appeal from Decision of Commissioners, Overruling Application to Strike Property from Duplicate.*

To the Honorable Board of County Commissioners of Okmulgee County, Oklahoma, and Fred H. Smith, Clerk of Okmulgee County, Oklahoma:

You are hereby notified that the said Cornelia Sweet, J. A. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, Cora M. B. Smith, J. L. Newhouse, W. L. Merwine, R. L. Sartain, Bessie Hill, J. R. Schoy and A. E. Carney, and all of the parties hereto, hereby appeal from the decision and order of the Honorable Board of County Commissioners overruling and refusing to allow their application for an order striking from the tax duplicate of the County of Okmulgee, State of Oklahoma, the real estate described and set forth in said application and also from the decision and order of the said board in refusing to strike said taxes from said duplicate, the decision and order of said board hereby appealed from was made and entered in said action on the 16th day of December, 1912.

Dated and filed herein on this 4th day of January, 1913.

MERWINE & NEWHOUSE,
Attorneys for Applicants.

Service of above is hereby acknowledged this 4th day of January, 1913.

CHARLES B. MEYRS,
Member of the Board of County Commissioners of Okmulgee County, Oklahoma."

Said notice of appeal and service of notice on the Board of County Commissioners had endorsed thereon, upon the back thereof the following words and figures:

"Number —. Before the Hon. Board of County Commissioners, Okmulgee County, Oklahoma. In the matter of the application of Cornelia Sweet et al. to strike certain property from tax duplicate. Notice of Appeal and Service of Notice on Board. Filed Jan. 4, 1913, County of Okmulgee, State of Oklahoma. Fred H. Smith, by R. H. Jenness, Deputy. Merwine & Newhouse, Attorneys."

On the 4th day of January, 1913, an appeal bond was filed with the County Clerk of Okmulgee County in said proceedings, which bond was in the words and figures following, to wit:

"Appeal Bond.

Know all men by these presents, That we, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, Cora M. B. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, A. E. Carney, Cornelia Sweet as principals and Herbert E. Smith as surety, are held and firmly bound unto Okmulgee County, State of Oklahoma, in the penal sum
35 of $300.00 for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents.

The condition of this obligation is such that whereas, on the 16th day of December, 1913, the above named principals and other parties therein named had entered against them a decision of the Honorable Board of County Commissioners of Okmulgee County, Oklahoma, overruling and dismissing their application for an order to strike certain real estate and certain taxes on such real estate from the duplicates of said county of Okmulgee, State of Oklahoma, from which decision and order of said county Commissioners, the said J. A. Price and said other parties above named have taken an appeal to the District Court of Okmulgee County, Oklahoma.

Now, if said appellants will prosecute their said appeal to effect, and without unnecessary delay, and if judgment be rendered against said appellants on said appeal, they will pay and satisfy all the costs herein and on said appeal, then this obligation to be null and void, otherwise to be and remain in full force and effect.

J. A. PRICE,
ADELINE PELL,
R. L. SARTAIN,
H. E. SMITH,
CORA M. B. SMITH,
W. L. MERWINE,
J. L. NEWHOUSE,
J. R. SCHOY,
BESSIE HILL,
J. L. PEACOCK,
W. R. ALEXANDER,
As Principals.

HERBERT E. SMITH,
As Surety.

This bond approved and accepted this 4th day of January, 1913.

FRED H. SMITH,
County Clerk,

[SEAL.] R. H. JENNESS, *Dep.*

Said bond, upon the back thereof, was endorsed in the words and figures following, to wit:

"Number 373. Before the Hon. Board of County Commissioners Okmulgee County, State of Oklahoma. Application to strike property from duplicate. Appeal Bond. Filed Jan. 4, 1913, County of Okmulgee, State of Okla. Merwine & Newhouse, Attorneys."

Clerk's Certificate.

STATE OF OKLAHOMA,
Okmulgee County, ss:

I, C. W. Goree, Clerk of Okmulgee County, State of
36–56 Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of all of the proceedings had before the Honorable Board of County Commissioners of Okmulgee County, State of Oklahoma, in the matter of the application of Cornelia Sweet, J. A. Price, Mabel H. Price, Coit C. Almy, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, Cora M. B. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, A. E. Carney, R. L. Sartain and Bessie Hill for an order striking certain real estate from the tax duplicate of said County and State, and remitting certain taxes, as the same now appear of record and on file in the office of the County Clerk of Okmulgee County, Oklahoma, and the proceedings had before said Honorable Board of County Commissioners.

Witness my hand and seal at Okmulgee, Oklahoma, this 24 day of January, 1913.

[SEAL.] (Signed) C. W. GOREE,
Clerk of Okmulgee County, Oklahoma.

Endorsed: "Number 2637. Before the Hon. Board of County Commissioners, Okmulgee County, State of Oklahoma. In the Matter of the Taxation of the Property of Cornelia Sweet and others. Transcript of the Proceedings before the Honorable Board of County Commissioners of Okmulgee County, Oklahoma. Filed Jan. 25, 1913. Ed Nern, Clerk. Merwine & Newhouse, Att'ys."

* * * * * * *

57 And thereafter, to wit, on the 11th day of October, 1913, there was filed in said Court, in said cause, an Amended Answer, which amended Answer, together with all the indorsements thereon, is in words and figures following, to wit:

58 In the District Court of Okmulgee County, Oklahoma.

No. 2637.

CORNELIA SWEET, J. A. PRICE, MABEL H. PRICE, COIT C. ALMY, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, Cora M. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, A. E. Carney, R. L. Sartain, and Bessie Hill, Plaintiffs,

vs.

ELMER E. SCHOCK, as Treasurer of Okmulgee County, Oklahoma, and The Board of County Commissioners of Okmulgee County, State of Oklahoma, Defendants.

Amended Answer.

Come now the defendants, Elmer E. Schock, as Treasurer of Okmulgee County, Oklahoma, and The Board of County Commissioners of Okmulgee County, State of Oklahoma, by Joseph W. Childers, County Attorney of said County, and for their amended answer to the petition and application of the plaintiffs, state:

First Cause of Defense.

1. That the defendants deny each and every allegation in said petition contained, except such allegations as are hereinafter specifically admitted.

2. That the defendants admit that the assessed valuation of the property as stated in said petition, as to the aggregate amount against each of said lots as set out is correct, but denies that the values of said lots and property as set forth in said petition are the fair and reasonable cash value of said lots and properties, estimated at the price each would bring at a fair voluntary sale of the same on the first day of March, 1912, but allege that the values attached thereto is in each instance much below the fair cash value of the same estimated at the price each would bring at a fair voluntary sale of the same on the first day of March, 1912. The defendants further allege that all of said lots so described in plaintiffs'
59 petition are improved with valuable improvements thereon, and that the estimated values as set forth in said petition for the most part consists of the value of the improvements thereon, and that the values of the said lots or parcels of land described in said petition, aside from the value of the improvements, is in each instance but a small part of the value of the whole.

The defendants further admit that said tax lists appear on the tax rolls of Okmulgee County, Oklahoma, and that the total amount of said taxes are correctly set forth in said petition. The defendant denies that any of said taxes so levied, assessed and extended upon the tax rolls of said county for the year 1912, as set forth in plain-

tiffs' petition are illegal, or that any of said properties therein set forth were or are nontaxable for the year 1912 as alleged therein.

The defendants further admit that Lot Three (3) of Section Seven (7), Township Thirteen (13), North, Range Thirteen (13) East, containing 41.82 acres, was the homestead allotment of the said Sarah Smith; that the said Sarah Smith was a Creek Freedwoman, and as such was duly enrolled upon the Creek Freedman Roll of said Creek Nation; that as such Creek freedwoman she received the said homestead deed issued to her on the 23rd day of April, 1904; that said deed was approved by the Secretary of the Interior on June 1st, 1904, but deny that said land is or was nontaxable for twenty-one years from the date of said deed.

Second Cause of Defense.

For a further and second cause of defense to said petition, and in bar of the right of any of the said plaintiffs to claim relief, either at law or in equity, these defendants say that before the said Sarah Smith procured said deed to said land and before said deed had been issued by the Principal Chief of the Creek Nation, and before the said Sarah Smith had any vested interest in said land, and before said deed had been approved by the Secretary of the
60 Interior, the Congress of the United States, by an Act of Congress, approved March 3, 1903, made the following provision which was applicable to said land, viz:

"* * * And provided further, that nothing herein contained shall prevent the survey and platting, at their expense, of townsites by private parties where stations are located along the line of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior."

Congress further provided by an Act entitled, An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes, approved April 26, 1906, as follows:

"* * * Provided further, That all lands upon which restrictions are removed shall be subject to taxation. * * *"

That under the several acts of Congress in relation thereto, and under the rules and regulations prescribed by the Secretary of the Interior, the said Sarah Smith, in the month of December, 1906, filed her petition, under oath, with the Commission to the Five Civilized Tribes, praying for the removal of her restrictions for the purpose of permitting her to sell a part of her said homestead for townsite purposes. That said Commission made an investigation of said application of the said Sarah Smith to alienate a part of her said homestead for townsite purposes, and upon due investigation made a report to the Secretary of the Interior, recommending the removal of said restrictions as prayed for in said petition. That thereafter, upon February 1, 1907, the Secretary of the Interior removed the restrictions upon the alienation of said land as prayed for, which letter removing said restrictions in the material parts is as follows:

"On January 25, 1907, the Indian Office transmitted your report dated December 10, 1906, with reference to a rehearing held before you in the matter of the application of Sarah Smith, a Creek Freedman, for authority to unrestrictedly alienate, as an addition to the townsite of Okmulgee in the Creek Nation, Indian Territory, in accordance with the provisions of an Act of Congress approved March 3, 1905, (32 Stat. 982) that part of her homestead reservation described as follows:

61 Beginning at the Southwest corner of Lot 3, of Section 7, Township 13 North, Range 13 East, thence east along the south line of said Lot 3, to a point about 399 feet west of the southeast corner of said lot 3, thence north to a point intersecting the north line of said lot 3, 399 feet west of the northeast corner of said lot 3, thence west to the northwest corner of lot 3, thence south along the west line of said section 7 to the point of beginning.

You consider it well established by the additional testimony taken, that the money received for the land heretofore sold by Jackson Smith and Sarah Smith, was not squandered, and that they are competent and well-to-do citizens considerably above the average Creek Freedman or the average white man, in the transaction of business. You also consider that the supplemental testimony does not indicate that the land is valuable for oil or gas mining purposes. You accordingly recommend that the petition be granted, and that Sarah Smith be authorized to sell the land described therein in one tract for a consideration of not less than $125.00 per acre, less $100.00, which has heretofore been paid as a part of said purchase price.

The Indian Office concurs in your recommendation. A copy of its letter is enclosed. This land is situated within the area probably valuable for oil development as determined by the United States Indian Inspector for the Indian Territory. It is within five miles of the boundary of this area, and the testimony would indicate it has no value for oil development.

The petition is granted and Sarah Smith is hereby authorized to sell the land described in the petition for a consideration of not less than $125.00 per acre, less $100.00 which has heretofore been paid as a part of the purchase price."

The defendants allege that thereafter, and under the terms and conditions imposed by law for the removal of said restrictions, that on the 28th day of February, 1907, by general warranty deed, the said Sarah Smith sold and conveyed the said land from which the restrictions had been removed as above specified, by the Secretary of the Interior to one Nathan D. Boyd.

That said deed did not by its terms, in letter or spirit, divest the State, County, City of Okmulgee, or the School District in which said property is located, of the authority and power to impose taxes upon any of said land, for any purpose. That said land was so purchased by the said Nathan D. Boyd, with the knowledge and understanding that the same was taxable for all purposes the same as if it had never been owned by any citizen of the Creek Nation, and the said Sarah Smith sold said land with the knowledge and understanding that the

same was taxable for all purposes. That said land so pur-
62 chased by the said Nathan D. Boyd was purchased by him for speculative townsite purposes, and that he has since sold and disposed of all of said lands, but with no stipulation, or reservations in any of the deeds of conveyance made by him to any part of the same, that said lands should not be taxable, nor did he ever make any representations to any of his grantees that said land was exempt from taxation.

The defendant- further allege that immediately after the purchase of said land as aforesaid by the said Nathan B. Boyd, that he caused the same to be surveyed and platted into lots, blocks, streets and alleys, and that on the 29th day of July, 1907, he caused a plat of said land to be filed in the office of the register of deeds at Okmulgee; that said plat contained all of the property described in plaintiff's petition, described as blocks 3, 4, 5, 6, 7, and 8, of said Capital Heights Addition, the collection of taxes on which is objected to by said plaintiffs. That upon all of said property taxes were duly levied for the years 1908, 1909, 1910, 1911, and all of which have been paid by the plaintiffs herein or by their grantors.

Third Cause of Defense.

The defendants for a further and third cause of defense allege that on the 27th day of May, 1908, Congress by an Act entitled "An Act for the Removal of Restrictions from Part of the lands of Allottees of the Five Civilized Tribes, and For Other Purposes," which said act became effective on the 26th day of July, 1908, provided as follows:

"All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than one half Indian blood including minors shall be free from all restrictions."

That said Act also contained the following further provision:

"Sec. 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil
63 burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

The defendants allege that under the foregoing act of Congress and the several acts of Congress prior thereto in regard to the removal of restrictions against the alienation of the lands allotted to the members of the Five Civilized Tribes, that the restrictions against the alienation of the remaining portion of the said homestead allotment of the said Sarah Smith, consisting of approximately 13.82 acres, were removed, and that from and after the 26th day of July 1908, the said Sarah Smith was authorized to sell and transfer the same, and that when she did so convey said premises said land ceased to be exempt from taxation, and was subject to taxation for all purposes as though the same had never been owned by an allottee of the Five Civilized Tribes. That after the said 26th day of July, 1908, the said Sarah Smith caused said remaining portions of her said homestead allotment to be surveyed and platted into lots, blocks,

streets and alleys, to conform to the plat of the remaining portion of her said homestead allotment which had prior to said time been platted by the said Nathan D. Boyd, and that her said plat became known as Capital Heights Addition Number Two; that said plat was duly filed for record in the office of the register of deeds of Okmulgee County, Oklahoma, on the 13th day of August, 1908. That said addition, Capital Heights Addition Number Two, contains all of the lots and blocks described in the plaintiffs' petition as belonging to said addition, and which said lots are claimed as exempt from taxation for the year 1912, and are described as blocks 9, 10, 11 and 12 of said addition. The defendants further allege that if the plaintiffs are the owners of said lots and parcels of land so described, they were purchased from the said Sarah Smith, or her grantees, after the 26th day of July, 1908, and were purchased *to*bject to the provisions of said act of May 27, 1908, in regard to taxation and in accordance with the provisions of said act, and are therefore, not exempt from taxation after the purchase of the same from the said Sarah Smith.

64 Fourth Cause of Defense.

The defendants for a further and a fourth cause of defense to the actions of the plaintiff allege that immediately after the platting of the said two additions formed from the lands that formerly composed the homestead allotment of the said Sarah Smith, all of said property became valuable for residence property, and that on the 7th day of June, 1909, by a proper ordinance duly and properly passed by the City Council of the City of Okmulgee, Oklahoma, both of said additions were incorporated into and made a part of the incorporated city of Okmulgee, Oklahoma.

That after said additions became a part of the said incorporated limits of the said city of Okmulgee, and from year to year since said date, the public funds gathered from taxation of all of the property within the incorporated limits of said city, including state, county, municipal, school and special taxes, have been expended, used and applied for the use, benefit and protection of all of the citizens of both of said additions, including the petitioners herein, freely and without discrimination.

That in the year 1910, a city election was held in said city of Okmulgee for the purpose of authorizing the mayor and city council of said city to issue the bonds of said city in the sum of $60,000.00, for the purpose of extending the water and sewer system of said city. That at said city election the qualified voters of both of said additions voted at said election, and the defendants are informed and believe that the plaintiffs herein voted in favor of said bond issue. That at said election the issue of said bonds wa*a* authorized and thereafter the said mayor and city council did issue the said bonds of said city in the sum of $60,000.00, and the funds derived therefrom were used in the extension of the said water and sewer system of said city, and the plaintiffs herein are now all participating in the uses and benefits of the same to the same effect as the other citizens of said city.

65 That a part of the taxes complained of by the plaintiffs was levied and assessed for the purpose of paying the interest due on said bonds and to create a sinking fund to pay said bonds when due. That said taxes are necessary for said purposes.

The defendants further allege that in addition to the said sum of $60,000.00 indebtedness so incurred by said city, that prior to the issue of said bonds, the city had become indebted for the purpose of installing a water and sewerage system for said city in the additional sum of $113,000.00. That both of said additions and the inhabitants thereof have enjoyed the use and benefit of said water and sewerage system, since said additions became a part of said city, and the plaintiffs herein are now having the use and benefit of said water and sewerage system. That a part of the taxes complained of in plaintiffs' petition were levied and assessed to pay the interest accruing on said last named bonds, and to create a sinking fund to pay the same when due. That the plaintiffs herein have had the use and benefit of the water and sewer system of said city ever since they have owned, or claim to own the property described in said petition.

Fifth Cause of Defense.

The defendants for a further and fifth cause of defense to the petition and action of the plaintiffs allege that ever since the 28th day of February, 1907, all of the lands embraced in the homestead of the said Sarah Smith have been within the limits of the school district of the said city of Okmulgee and are now within the limits of said school district. That since the sale of the said lands by the said Sarah Smith the said school district of Okmulgee, for the purpose of building the necessary school buildings and for the purpose of procuring necessary school grounds and sites for school buildings has issued its school bonds in the sum of $105,000.00. That all of said bonds were authorized to be issued at elections properly called for that purpose in said district. That at all of the said school elections

66 the legal voters of both of said additions, including the plaintiffs herein, participated therein.

That since the inhabitants of said two additions have been within the limits of said school district they have had the benefit of all school privileges without discrimination, and the plaintiffs herein all now have the use and benefit of all the school privileges afforded by said district without any discrimination.

That a large part of the taxes complained of by the plaintiffs were levied and assessed for the purpose of paying the interest on the school bonds issued as herebefore described, and for the purpose of creating a sinking fund to pay off said bonds at maturity.

Sixth Cause of Defense.

The defendants for a further and a sixth cause of defense to the plaintiffs' petition, say:

1. That on the 1st day of March, 1909, at an election held in the school district of the city of Okmulgee, for the purpose of authorizing

the Board of Education of said city to issue its bonds in the sum of $3,000.00, for the purchase of a school site in said Capital Heights Addition, the legal voters of said addition, including the plaintiffs herein, voted at said election; that at said election said board of education was authorized to issue said bonds and in pursuance thereof said board of education did issue in bonds in the sum of $3,000.00, and with the proceeds purchased a site for a school house in said addition for the use and benefit of the residents of said addition including the plaintiffs herein.

That a part of the taxes complained of in plaintiffs' petition was levied for the purpose of paying the accrued interest on said bonds and for the purpose of creating a sinking fund to pay said bonds at maturity.

2. The defendants further allege that since the bringing of this action, at an election called for that purpose, participated in by the legal voters of both of said additions, including the plain-
67 tiffs, said board of education was authorized to issue school bonds in the sum of $15,000.00 for the purpose of erecting and equipping a school building upon the school site in said Capital Heights Addition, above referred to; that in pursuance to said authority the said board of education has issued its school bonds in said sum of $15,000, and with the proceeds is proceeding to erect a school house on said school site for the use and benefit of the residents of both of said additions and adjacent to the property of said plaintiffs. That the erection of said school building will enhance the value of each of the lots described in plaintiffs' petition. That but for the addition of both of said additions to said school district said school building would not have been necessary.

Seventh Cause of Defense.

For a further and seventh cause of defense to the petition of the plaintiffs the defendants allege that in the year 1912, the Excise Board of Okmulgee County, Oklahoma, found that to support the common schools of said county; that in order to procure the necessary funds to support the common schools of the city of Okmulgee, in which district the plaintiffs all reside, that it would be necessary for said Excise Board to order an election for the purpose of authorizing the levy of an additional tax levy in the said district of Okmulgee of 2.7 mills to support said city schools. That an election was thereafter called for said purpose and that at said election the legal voters of both of said additions, including the plaintiffs participated, in which said election said additional levy of 2.7 mills was authorized to be levied. The defendants are informed and believe that at said election the plaintiffs herein voted in favor of said tax levy.

That a part of the taxes complained of by the plaintiffs was levied for the purpose of collecting said extra tax so voted at said election which said levy was authorized by the plaintiffs.

68 Eighth Cause of Defense.

The defendants for a further and eighth cause of defense to the petition of the plaintiff allege and state.

That since the sale of the said lands by the said Sarah Smith the said plaintiffs have and are now receiving all of the benefits to be derived from the maintenance of state, county, and municipal government, maintained by public taxation, in the territory in which they now live. That the streets of that part of the city occupied by said plaintiffs have been maintained and are now maintained at public expense; that a water and sewer system has been established and is now maintained by the City of Okmulgee, for the use and benefit of the plaintiffs; that the indebtedness for the same was authorized by the votes of the plaintiffs; that the streets of said part of the city are lighted at public expense; that the board of education of said City of Okmulgee has provided and is now providing all necessary school facilities for the plaintiffs herein at the public expense; that said board of education has built school houses for the use and benefit of the plaintiffs herein, and the indebtedness incurred thereby by said board was authorized by the votes of the plaintiffs; that all of the inhabitants of said additions, including the plaintiffs herein, have had and are now having the use and benefit of all public improvement, water, sewers, lights, schools, without discrimination, that a part of the taxes of which said plaintiffs complain were levied to meet the general public expense incurred by the state, county and city in fully protecting the plaintiffs in the full and complete enjoyment of all of the rights, privileges and blessings of citizenship, and that said plaintiffs having helped to incur said expense, and having taken and enjoyed the benefits of the same, are now in all good conscience estopped to claim immunity and exemptions from the burdens of taxation common to all and without which the blessing of government cannot be maintained.

69 Ninth Cause of Defense.

The defendants for a further and ninth cause of defense to the petition of the plaintiffs, allege and state;

That each year since said above described real estate was so sold by the said Sarah Smith, the allottee, all of said lots and parcels of land have been regularly assessed and taxed for state, county, municipal, school and special purposes, and that all of said taxes so levied and assessed have been paid by the several defendants or by their grantors, except the taxes for the year 1912.

Wherefore, The defendants pray that the temporary injunction heretofore issued by this court in this cause may be dissolved; that this cause may be dismissed and that the defendant may go hence without day, and that they may recover their costs herein.

(Signed.) J. W. CHILDERS,
County Attorney of
Okmulgee County, Oklahoma.

(Signed.) ORLANDO SWAIN,
Attorney for Defendants.

Endorsements: "No. 2637. In the District Court of Okmulgee County, Oklahoma. Cornelia Sweet et al., Plaintiffs, vs. The Board of County Commissioners of Okmulgee County, Oklahoma. Amended Answer. State of Oklahoma, County of Okmulgee. Received and filed. Filed out of Rule by consent of Merwine & Newhouse, Att'y's for Sweet et al. Oct. 11, 1913. Ed. Nern, Clerk of Dist. Court. Joseph W. Childers, County Attorney."

70 And Thereafter, to wit, on the 14th day of October, 1913, there was filed in said cause, in the office of the Clerk of said Court, a Demurrer to Amended Answer, which said Demurrer, together with all the endorsements thereon, is in words and figures following, to wit:

71 District Court, Okmulgee County, Oklahoma.

Number 2637.

CORNELIA SWEET et al., Plaintiffs,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF OKMULGEE COUNTY, Oklahoma, Defendants.

Demurrer to Amended Answer.

Come now the plaintiffs, or appellants, herein and demur to the second paragraph in the first "cause of defense" designated in the amended answer herein, and to the second, third, fourth, fifth sixth, seventh and eighth "causes of defense" set forth in the amended answer herein for the reason that said alleged several defenses do not state facts sufficient to constitute a defense to the petition or application of the appellants herein.

(Signed.) MERWINE & NEWHOUSE,
Attorneys for Appellants.

Endorsements: "2637. District Court. Cornelia Sweet et al., Plaintiffs, vs. Board of County Commissioners. Demurrer to Amended Answer. State of Oklahoma, County of Okmulgee. Received and filed Oct. 14, 1913. Ed Nern, Clerk of Dist. Court, by Mabel Gallagher, Deputy. Merwine & Newhouse, Attorneys."

72 And Thereafter, to wit, on the 3rd day of November, 1913, the regular November, 1913, Term of the District Court in and for Okmulgee County, State of Oklahoma, convened in regular session, whereupon, the following proceedings were had and done in said cause in said Court, as the same are made to appear from the Journal of the Clerk of said Court, which journal entry is in words and figures following:

73 MONDAY, November 3rd, 1913.

Be it remembered that the District Court in and for Okmulgee County, Twenty-second Judicial District of the State of Oklahoma, convened on this 3rd day of November, A. D., 1913, pursuant to an act of the legislature of the State of Oklahoma.

Present: The Honorable Wade S. Stanfield, Judge; Ed Nern, District Clerk; J. W. Childers, County Attorney; Orvel Thompson, Sheriff, B. F. Brown, Bailiff; and public proclamation of the opening of court having been made, court convened at 9 o'clock A. M., the Honorable Wade S. Stanfield, Judge, presiding.

2637.

CORNELIA SWEET et al., Plaintiffs,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF OKMULGEE COUNTY, Oklahoma, Defendants.

Now on this 3rd day of November, 1913, this cause came on to be heard on the demurrer of said Cornelia Sweet, J. L. Peacock, Adeline Pell, W. L. Merwine, W. R. Alexander, Walter Weimer, Bessie Hill, Cora M. Smith, J. P. Snook, R. L. Sartain, J. R. Schoy, James C. Carney, Bertha D. Terry, H. E. Smith, Grace A. Hall, J. L. Newhouse, Coit C. Almy, J. A. Price and Mabel H. Price, the appellants or petitioners herein, to the second paragraph in the first defense of the amended answer to the application or petition herein, and the same was presented to the Court, and argued by counsel, and upon due consideration thereof, the Court finds said demurrer well taken, and sustains the same, to all of which the defendants except and thereupon, the said defendants elect not to plead further.

74 And Thereafter, to wit, on the 2nd day of February, 1914, the same being a regular court day of the November, 1913, Term of said Court, there was filed in said cause, a Stipulation, which said stipulation, together with all the indorsements thereon, is in words and figures following:

75 In the District Court of Okmulgee County, Oklahoma.

No. 2637.

CORNELIA SWEET, J. A. PRICE, MABEL H. PRICE, COIT C. ALMY, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. P. Snook, Cora M. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, A. E. Carney, R. L. Sartain and Bessie Hill, Plaintiffs,

vs.

ELMER E. SCHOCK, as Treasurer of Okmulgee County, Oklahoma, and The Board of County Commissioners of Okmulgee County, Oklahoma, Defendants.

Stipulation.

Come now all of the parties hereto by their attorneys and stipulate and agree that the cause of Cornelia Sweet, and the other plaintiffs above named, vs. Elmer E. Schock, as Treasurer of Okmulgee County, Oklahoma; and the cause of Cornelia Sweet, and the other plaintiffs above named, In the Matter of the Taxation of the Property of said Cornelia Sweet et al., before the Board of County Commissioners of Okmulgee County, Oklahoma, which said last cause has been brought to this Court on appeal from the action of the Board of County Commissioners of Okmulgee County, by said plaintiffs, and in which is involved the same property as in said first cause; shall be merged and submitted to the court as one cause; and that all of the pleadings filed in either cause are to be considered as filed in both causes; and that the amended answer of the said Board of County Commissioners of Okmulgee County, filed in this cause on the 11th day of October, 1913, shall be amended and shall also be considered as the answer of Elmer E. Schock, as Treasurer of Okmulgee County, Oklahoma; and that both of said causes so merged shall be submitted to the court upon one agreed
76 statement of facts, which said statement of facts so agreed to is this day filed and submitted to the court.

Feb. 2, 1914.

(Signed) MERWINE & NEWHOUSE,
Attorneys for the Plaintiffs.

(Signed) J. W. CHILDERS AND
ORLANDO SWAIN,
Attorneys for the Defendants.

Endorsements: "No. 2637. In the District Court of Okmulgee County, Oklahoma. Cornelia Sweet et al., Plaintiffs, vs. Elmer E. Schock, as Treasurer of Okmulgee County et al., Defendants. Stipulation. State of Oklahoma, County of Okmulgee. Received and Filed Feb. 2, 1914. Ed Nern, Clerk of Dist. Court."

77 And on the same day, to wit, the 2nd day of February, 1914, there was filed in said Court in said cause, an Agreed Statement of Facts, which said Statement, together with all the indorsements thereon, is in words and figures following, to wit:

78 "In the District Court of Okmulgee County," State of Oklahoma.

No. 2637.

CORNELIA SWEET, J. A. PRICE, MABEL H. PRICE, COIT C. ALMY, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, Cora M. Smith, J. P. Snook, J. L. Newhouse, W. L. Merwine, Bessie Hill, R. L. Sartain, J. R. Schoy, and A. E. Carney, Plaintiffs,

vs.

ELMER E. SCHOCK, as Treasurer of Okmulgee County, Oklahoma, Defendant.

Agreed Statement of Facts.

It is agreed by and between counsel for plaintiffs or the applicants in this action, and Counsel for the defendant herein, that the records in the office of the Register of Deeds of Okmulgee County, and in the Treasurer's Office of Okmulgee County, Oklahoma, show the following facts, and the following facts are admitted and agreed to as evidence to be used on the trial in the above cause.

1. That on the 23rd day of April, 1904, the Creek Nation of Indians, by P. Porter, its Principal Chief, by deed of conveyance or patent, conveyed unto one Sarah Smith, a Freedman citizen of said Nation, who had been placed on the final rolls of the citizens and Freedmen of said Nation, the following described real estate, situated in the city of Okmulgee, Okmulgee County, State of Oklahoma, to wit:

Lot Three (3) of Section Seven (7) Township Thirteen (13) North, Range Thirteen (13) East, containing 41.82 acres,

79 more or less, and said patent was duly approved by the Secretary of the Interior as required by law, a copy of which patent is as follows:

"Homestead Deed No. —, Creek Freedman Roll No. 332.

To all to whom these presents shall come, Greeting:

Whereas, by the Act of Congress approved March 1 1901, (31 Stat. 861) agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, shall be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, It was provided by said Act of Congress, that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead, for which he shall have a separate deed; and

Whereas, the said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Sarah Smith, a citizen of said tribe as a homestead;

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said Sarah Smith all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz: Lot Three (3) of Section Seven (7) Township Thirteen (13) North and Range Thirteen (13) East of the Indian Base and Meridian, in Indian Territory, containing forty one & 82/100 acres, more or less, as the case may be, according to the United States survey thereof; subject, however, to the conditions provided by said Act of Congress, and which conditions are that said lands shall be non-taxable and inalienable and free from any incumbrance whatever for 21 years; and subject, also, to the provisions of the Act of Congress, relating to the use, devise and descent of said land after the death of the said Sarah Smith and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902, (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 23rd day of April, A. D. 1904.

[SEAL.] P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

L. R. S.

Department of the Interior.

Approved May 23, 1904.
THOMAS RYAN,
Acting Secretary.
By OLIVER G. PHELPS, *Clerk.*

Filed for record on 1st day of June, 1904, at 11 o'clock A. M. and recorded in Book W page 501. Recorded in Register of Deeds' Office in Book H 2, page 305."

80 2. That said real estate was conveyed to the said Sarah Smith as and for her homestead, and was so designated in said conveyance, and said conveyance at the time of its execution and delivery, contained the express provisions that said real estate described in said deed, should be non-taxable for twenty-one years from the date of said deed.

3. That thereafter, on the 28th day of February, 1907, the restrictions on the alienation of said real estate having been removed by the Secretary of the Interior, upon the application and petition of Sarah Smith, (as alleged in the defendant's answer, and set forth in the second cause of defense, contained in the amended answer of the defendant) the said Sarah Smith, by deed of general warranty, conveyed fee simple title to one Nathan Boyd of the following of the above described real estate:

Beginning at the southwest corner of said Lot Three (3), Section Seven (7), Township Thirteen (13) North, Range Thirteen (13) East; thence east along the south line of said Lot Three (3) to a point about 399 feet west of the southwest corner of said Lot Three (3) thence north to a point intersecting the north line of said Lot Three (3), 399 feet west of the northwest corner of Lot Three (3), thence west to the Northwest corner of said Lot Three, (3), thence south along the west line of said Section Seven (7) to the point of beginning, together with all the improvements thereon, less 1.69 acres occupied as the right-of-way of the Ozark & Cherokee Central Railway Company;

and that said deed was filed for record with the Register of Deeds of Okmulgee County, Oklahoma, and was by him duly recorded in the proper records of his office. It is further agreed that at the time of said conveyance to the said Nathan D. Boyd, of the lands above described, there were no improvements thereon, and that said deed contained no stipulation, reservation or agreement that said land should be exempt from taxation.

81 4. That on the 1st day of May, 1907, the said Nathan Boyd being the owner of said real estate last described, caused said lands to be surveyed, platted and laid out into lots, blocks, streets and alleys, all according to law, and filed said plat for record, designating the same as the Capital Heights Addition to the City of Okmulgee, Oklahoma, which said plat was duly accepted by the proper authorities for said city of Okmulgee, Oklahoma, and said Addition is now a part of, and within the incorporated boundaries of said city of Okmulgee, Oklahoma, and the same lies entirely within the lands so conveyed by the Creek Nation to the said Sarah Smith, as and for her homestead.

5. That the said Sarah Smith, after July 26, 1908, having conveyed a portion of her homestead to the said Nathan Boyd as above set out, caused the remaining portions of said real estate in her said homestead as aforesaid, to be surveyed, platted and laid out into lots, blocks, streets and alleys, all according to law, and the same was duly filed for record with the Register of Deeds of Okmulgee County, Oklahoma, and said Addition was designated as Capital Heights Addition to the City of Okmulgee, Oklahoma, and said Capital Heights' Second Addition to said city of Okmulgee, Oklahoma, is now a part of said city, and lies entirely within the incorporated limits of said city.

6. That each of the lots in each of said Additions, numbered, designated and tabulated as below in this paragraph set out, have

been placed by the Assessor for said Okmulgee County, Oklahoma, upon the tax duplicate of said Okmulgee County, Oklahoma, and upon the tax duplicates of said City of Okmulgee, Oklahoma, for taxation for the year 1912, for the valuations hereafter set forth, and a tax levied on each of said lots, as is set forth below, with the names of the owners, the valuation for taxation, the amount of the taxes charged for the year 1912, in Capital Heights Addition, Number Two, to said City:

82

Name.	Lot number.	Block.	Value.	Tax.
Cornelia Sweet	One	12	$300.00	$11.78
Cornelia Sweet	Two	12	1500.00	58.88
J. L. Peacock	Six	12	250.00	9.81
J. L. Peacock	Seven	12	250.00	9.81
Adeline Pell	Ten	12	650.00	25.59
W. L. Merwine	Three	12	500.00	19.63
W. L. Merwine	Four	12	225.00	8.83
W. L. Merwine	Five	12	225.00	8.83
W. R. Alexander	Three	10	75.00	2.49
Walter Weimer	Ten	10	200.00	7.85
Walter Weimer	Eleven	10	200.00	7.85
Walter Weimer	Twelve	10	225.00	8.85
Bessie Hill	One	11	30.00	1.18
Bessie Hill	Two	11	30.00	1.18
Bessie Hill	Three	11	30.00	1.18
Bessie Hill	Four	11	30.00	1.18
Bessie Hill	Eleven	11	100.00	3.92
Bessie Hill	Twelve	11	100.00	3.92
Cora M. Smith	Twelve	9	579.00	22.56
J. P. Snook	Two	9	25.00	.99
J. P. Snook	Three	9	25.00	.99
J. P. Snook	Four	9	25.00	.99
J. P. Snook	Five	9	25.00	.99
J. P. Snook	Six	9	25.00	.99
J. P. Snook	Seven	9	100.00	3.92
J. P. Snook	Eight	9	100.00	3.92
J. P. Snook	Nine	9	275.00	10.79

The following are the lots, the names of the owners, the valuation of same for taxation, and the amount of taxes charged for the year 1912, as placed upon the duplicate by the Assessor and Treasurer for said County of Okmulgee, Oklahoma, in Capital Heights Addition Number One, aforesaid:

Name.	Lot number.	Block.	Value.	Tax.
Bessie Hill	Two	8	$250.00	$9.81
Bessie Hill	Three	8	1050.00	41.81
R. L. Sartain	Fourteen	3	200.00	7.85
R. L. Sartain	Fifteen	3	600.00	23.55
J. R. Schoy	Five	5	1550.00	60.84
James C. Carney	Four	6	1550.00	60.84

Name.	Lot number.	Block.	Value.	Tax.
Bertha D. Terry	Eighteen	3	250.00	9.81
Bertha D. Terry	Nineteen	3	450.00	17.65
H. E. Smith	Two	5	150.00	5.89
H. E. Smith	Three	5	1500.00	58.88
Cora M. Smith	Two	5	150.00	5.89
Cora M. Smith	One	5	450.00	16.69
Grace A. Hall	One	6	1500.00	58.88
Grace A. Hall	Two	6	150.00	5.89
John T. Hall	Twenty-two	6	300.00	11.77
J. L. Newhouse	Five	4	300.00	11.77
J. L. Newhouse	Six	4	1550.00	60.84
Coit C. Almy	Two	6	150.00	5.89
Coit C. Almy	Three	6	1700.00	66.73
Coit C. Almy	Sixteen	7	175.00	6.86
Coit C. Almy	Eleven	8	800.00	31.40
J. A. Price	Seven	4	1500.00	58.80
83				
J. A. Price	Eleven	3	$500.00	$19.63
J. A. Price	Eleven	5	265.00	10.79
J. A. Price	Twelve	5	300.00	11.78
Mabel H. Price	Six	6	750.00	29.45

7. That the plaintiffs, or the applicants herein are each the owner, in fee simple, of the lots designated above as belonging to them, and so placed upon the tax duplicates of said County, and the title to each of said lots above described and so belonging to said plaintiffs or applicants herein, passed to each of them by successive conveyances or chain of title, from the said Nathan Boyd and Sarah Smith, aforesaid, each of said conveyances being in due form of law, and each operating to convey title to said real estate, in the chain of title thereof, from the said Sarah Smith and Nathan Boyd, to each of the aforesaid present owners of each of said lots, all of which is disclosed by the record title to said real estate, as the same appears of record in the various public records of said County and State.

8. It is further agreed that none of the deeds so made by the said Sarah Smith and Nathan Boyd, to any of their several grantees, contains any reservation or agreement that any of said lands should be exempt from taxation.

9. It is further agreed that all of the improvements on said lot and parcels of land described herein were placed thereon by persons other than the said Nathan Boyd and Sarah Smith, and that all of said improvements were on said lands at the time said taxes complained of, were levied and assessed against said property.

10. That unless the restraining order herein is made perpetual by the District Court of Okmulgee County, Oklahoma, the present Treasurer of said County will proceed to sell the above described lands and lots so belonging to the plaintiffs, or applicants herein,

for the payment of the alleged taxes assessed against the
84 same, and he will place a penalty of eighteen per cent. thereon, and will sell the real estate for the purpose of collecting said taxes, and the penalty so placed thereon.

In witness whereof, we have hereunto set our hands on this 2 day of February, 1914.

(Signed) MERWINE & NEWHOUSE,
Attorneys for Plaintiffs.
(Signed) J. W. CHILDERS,
Attorneys for the Defendant, the County Treasurer.
(Signed) ORLANDO SWAIN,
Attorney for Defendant.

Endorsements: "No. 2637. In District Court, Okmulgee County, Oklahoma. Cornelia Sweet et al. vs. Elmer E. Schock, as Treasurer of Okmulgee County, Oklahoma. Agreed Statement of Facts. State of Oklahoma, County of Okmulgee. Received and Filed Feb. 2, 1914. Ed Nern, Clerk of Dist. Court."

85 And thereafter, and on the same day, to wit, the 2nd day of February, 1914, there was filed and entered of record in said cause, in said Court, a Decree, which said Decree, together with all the indorsements thereon, is in words and figures following, to wit:

86 "In the District Court of Okmulgee County, State of Oklahoma.

No. 2637.

CORNELIA SWEET, J. A. PRICE, MABEL H. PRICE, COIT C. ALMY, W. R. Alexander, Walter Weimer, John T. Hall, Grace A. Hall, Bertha D. Terry, Adeline Pell, J. L. Peacock, H. E. Smith, J. B. Snook, Cora M. Smith, J. L. Newhouse, W. L. Merwine, J. R. Schoy, A. E. Carney, R. L. Sartain, and Bessie Hill, Plaintiffs,

vs.

ELMER E. SHOCK, as Treasurer of Okmulgee County, Oklahoma, and Board of County Commissioners of Okmulgee County, Oklahoma, Defendants.

Decree.

Now on this the 2nd day of February, 1914, this cause came on to be heard upon the application or petition herein on appeal from the action of the Honorable Board of County Commissioners of Okmulgee County, State of Oklahoma, the amended answer thereto of the said Board of County Commissioners and the reply to said answer by said appellants and the agreed statement of facts filed therein, and also upon the petition of the said Cornelia Sweet et al., against the treasurer of said Okmulgee County, Oklahoma, for an injunction, the amended answer thereto of the said Treasurer of said Okmulgee County, Oklahoma, and the reply thereto of Cornelia

Sweet et al., and the agreed statement of facts, and said causes were heard by the Court upon the evidence, and the argument of counsel and upon due consideration thereof, the Court being advised finds that said action of the Board of County Commissioners in refusing to allow the petitioners before them the relief asked for should be reversed and set aside, and that the injunction heretofore allowed herein against said Elmer E. Schock, as Treasurer of said Company, and his successor in office should be made perpetual.

87 It is therefore ordered, adjudged and decreed, That the action of the Board of County Commissioners in refusing to allow the petitioners the relief asked for in the proceedings had before said Board be and the same are hereby reversed, set aside and held for naught, and that the said Board of County Commissioners of Okmulgee County, Oklahoma, or their successors in office be and they are hereby ordered and directed to strike, or cause to be stricken from the tax duplicate of Okmulgee County, Oklahoma, the following list of taxes against the real estate hereinafter designated for the years therein designated, and to strike from the tax duplicate of said County and State the following lots in said Capital Heights Addition to the City of Okmulgee, Oklahoma, to wit:

Name.	Lot No.	Block.	1912 Tax.
Bessie Hill	2	8	$9.81
Bessie Hill	3	8	41.21
R. L. Sartain	14	3	7.05
R. L. Sartain	15	3	23.55
J. R. Schoy	5	5	60.84
Bertha D. Terry	18	3	9.81
Bertha D. Terry	19	3	17.65
H. E. Smith, S. Half	2	5	5.89
H. E. Smith	3	5	58.88
Cora M. Smith, N. Half	2	5	5.89
Cora M. Smith	1	5	16.69
Grace A. Hall	1	6	58.88
Grace A. Hall, N. Half	2	6	5.89
John T. Hall	2	6	11.77
J. L. Newhouse	5	4	11.77
J. L. Newhouse	6	4	60.84
Coit C. Almy, S. Half	2	6	5.89
Coit C. Almy	3	6	66.73
Coit C. Almy	16	7	6.86
Coit C. Almy	11	8	31.40
J. A. Price	7	4	58.80
J. A. Price	11	3	19.63
J. A. Price	11	5	10.73
J. A. Price	12	5	11.78
Mabel H. Price	6	6	29.45

And to strike, or cause to be stricken from the tax duplicate of said County and State the following lots belonging to the following

owners thereof, and the following amounts of tax assessed against the same for the years therein designated in said Capital Heights Addition No. 2 in the said City of Okmulgee, Oklahoma, to wit:

88

Name.	Lot No.	Block.	1912 Tax
Cornelia Sweet	1	12	11.78
Cornelia Sweet	2	12	58.88
J. L. Peacock	6	12	9.81
J. L. Peacock	7	12	9.81
Adeline Pell	10	12	25.59
W. L. Merwine	3	12	19.63
W. L. Merwine	4	12	6.83
W. L. Merwine	5	12	6.83
W. R. Alexander	3	10	2.94
Walter Weimer	10	10	7.85
Walter Weimer	11	10	7.85
Walter Weimer	12	10	8.85
Bessie Hill	1	11	1.18
Bessie Hill	2	11	1.18
Bessie Hill	3	11	1.18
Bessie Hill	4	11	1.18
Bessie Hill	11	11	3.92
Bessie Hill	12	11	3.92
Cora M. Smith	1	9	.99
Cora M. Smith	12	9	22.56
J. P. Snook	2	9	.99
J. P. Snook	3	9	.99
J. P. Snook	4	9	.99
J. P. Snook	5	9	.99
J. P. Snook	6	9	.99
J. P. Snook	7	9	3.92

To all of which the said Elmer E. Schock, Treasurer of Okmulgee County, Oklahoma, and his successor in office and the Board of County Commissioners of Okmulgee County, Oklahoma, and their successors in office respectively except.

It is further considered, Adjudged and Decreed, That the said Elmer E. Schock, as Treasurer of Okmulgee County, Oklahoma, and his successors in office be, and they are hereby enjoined from selling any of the above lots mentioned and designated in the proceedings herein and from placing any penalty on any thereof, or from taking any step towards the collection of these taxes, while this proceeding is pending in this Court or to any Court to which these proceedings may be properly appealed, to all of which the said Treasurer of said County and his successor in office and the said Board of County Commissioners of said County respectively except.

89 Thereupon, on the same day, the said Treasurer of Okmulgee County, and said Board of County Commissioners of said County filed their motion herein for a new trial and the

same was heard by the Court and overruled, and thereupon the said Elmer E. Schock, as Treasurer of said County and his successor in office and said Board of Commissioners of said County and State and their successors in office respectively excepted.

And it having been made to appear to the Court that the said A. E. Carney does not desire to further prosecute this appeal as to him, and said suit and injunction as to him are dismissed as to the said A. E. Carney.

Whereupon the Treasurer of Okmulgee County, Oklahoma, and the Honorable Board of County Commissioners of Okmulgee County, Oklahoma, prayed an appeal to the Supreme Court of the State of Oklahoma, which is granted, and for cause shown an extension of thirty days was given to prepare and serve a case made, and the said Cornelia Sweet et al., suing in like capacity are given ten days thereafter in which to suggest amendments thereto, and said case made is to be settled upon five days' notice.

(Signed.) WADE S. STANFIELD,
Judge of the District Court of Okmulgee County, Oklahoma.

O. K.
ORLANDO SWAIN,
J. W. CHILDERS,
County Att'y.
MERWINE & NEWHOUSE, *Att'ys.*

90 Endorsements: "No. 2637. District Court, Okmulgee County, Oklahoma. Cornelia Sweet et al., Plaintiffs, vs. Elmer E. Schock, etc., Defendants. Decree. Merwine & Newhouse, Attorneys for Plaintiffs. State of Oklahoma, County of Okmulgee. Received and Filed Feb. 2 1914. Ed Nern, Clerk of Dist. Court."

91 And Thereafter, and on the same day, to wit, the 2nd day of February, 1914, there was filed in the office of the Clerk of said Court, in said cause, a Motion for New Trial, which said Motion, together with all the indorsements thereon, is in words and figures following:

92 In the District Court of Okmulgee County, Oklahoma.

No. 2637.

CORNELIA A. SWEET et al., Plaintiffs,
vs.
ELMER E. SCHOCK, as Treasurer of Okmulgee County, Oklahoma, and The Board of County Commissioners of Okmulgee County, Oklahoma, Defendants.

Motion for a New Trial.

Come now the defendants herein and move the Court to vacate and set aside the judgment and decree entered in this cause on the

6th day of February, 1914, and grant the defendants a new trial in said cause, for the following reasons which materially affect the substantial rights of these defendants.

First. The court erred in overruling the demurrer of the defendants to the petition of the plaintiffs.

Second. That the Court erred in sustaining the demurrer of the plaintiffs to the amended answer of the defendants.

Third. That the court erred in sustaining the demurrer of the plaintiffs to the second paragraph of the first defense of the defendants in defendants' amended answer, and to the second, third, fourth, fifth, sixth, seventh, and eighth defenses in said amended answer.

Fourth. For errors of law occurring at the trial and duly excepted to by the defendants.

Fifth. For the reason that said judgment and decree is not sustained by the evidence, but is contrary to the evidence.

Sixth. For the reason that said judgment and decree is contrary to the law.

93-103 Seventh. For the reason that said judgment and decree should have been rendered in favor of the defendants and against the plaintiffs.

Wherefore, the defendants pray that said judgment and decree may be vacated and set aside and a new trial granted in this cause.

(Signed) J. W. CHILDERS AND
ORLANDO SWAIN,
Attorneys for the Defendants.

Endorsements: "No. 2637. In the District Court of Okmulgee County, Oklahoma. Cornelia Sweet et al., Plaintiffs, vs. Elmer E. Schock, as Treasurer of Okmulgee County, Oklahoma, and Board of County Commissioners of Okmulgee County. Motion for a New Trial. J. W. Childers, Orlando Swain, Attorneys for Defendants. State of Oklahoma, County of Okmulgee. Received and Filed Feb. 2 1914. Ed Nern, Clerk of Dist. Court." (Note: For overruling of motion for new trial, see page 73 in this case made.)

* * * * * * *

194 And thereafter, at the October, 1914, Term of said Supreme Court, on the 15th day of December, 1914, the following proceeding was had in said cause, to wit:

#6410.

ELMER E. SCHOCK, Treas., et al., Plaintiffs in Error,
vs.
CORNELIA SWEET et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed with directions.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed, with directions to set aside the judgment and render judgment for defendants.

Opinion by Riddle, J.

All the Justices concur, except Kane, C. J., absent and not participating.

105 (Filed Dec. 15, 1914. Wm. M. Franklin, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 6410.

ELMER E. SCHOCK, Treasurer of Okmulgee County, and the Board of County Commissioners of Okmulgee County, Plaintiffs in Error,

vs.

CORNELIA SWEET et al., Defendants in Error.

Filed Dec. 15, 1914. Wm. M. Franklin, Clerk.

Syllabus.

1. The town lots involved were part of the homestead allotment of a Creek freedman, which allotment, under Section 16 of the Allotment Act (32 Stat. L. 500, c. 1325) was to be inalienable and nontaxable for a period of 21 years from date of issuance of patent. The Act of Congress of March 3, 1903 (32 Stat. L. p. 996), provides: "And provided further, That nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior." Under this law, the allottee made application to the Secretary of the Interior and caused the restrictions upon alienation of said land to be removed. At the date of the removal of said restrictions, section 19 of the Act of Congress of April 26, 1906, was in force, which section provides: "That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation, as long as the title remains in the allottee." The land was platted into lots and blocks, and plaintiffs thereafter purchased said lots. Defendants placed same on the tax rolls, and assessed said property for taxation against plaintiffs. Plaintiffs filed their petition with the county commissioners, demanding that said lots be stricken from the tax rolls. Said petition was denied. Upon appeal to the district court, judgment was rendered for plaintiffs, restraining the collection of taxes on said property. Held: Error, for the reason said property was not exempt from taxation after title passed from the allottee to plaintiffs.

2. Plaintiffs obtained title to the property involved through and by virtue of the provisions of the Act of Congress of March 3, 1903, supra. They now seek to have exempted from taxation said property. Held: That except by virtue of the provision of the Act of Congress of March 3, 1903, supra, plaintiffs could not have secured title to said property; that said Act nowhere attempts to exempt said property from taxation; that the use to which said property has been appropriated is inconsistent with continuing the exemption from taxation. Therefore, said property is subject to taxes.

Error from the District Court of Okmulgee County. Wade S. Stanfield, Judge.

Reversed.

Orlando Swain and J. W. Childers, of Okmulgee, Okl., Attorneys for Plaintiffs in Error.

106 Merwine, Newhouse & Albertson, of Okmulgee, Okl., Attorneys for Defendants in Error.

Opinion of the Court by

RIDDLE, *J.*:

Defendants in error will be denominated the plaintiffs, and the plaintiffs in error, the defendants. Plaintiffs are owners of certain lots in what is known as the Capital Heights Additions, Nos. 1 and 2, in the city of Okmulgee, being the same lots referred to in the agreed statement. These lots were part of the homestead allotment of Sarah Smith, a Creek freedwoman. The lots were assessed and placed on the tax rolls by the authorities of Okmulgee county for the year 1912. Plaintiffs filed their petition with the board of county Commissioners in November, 1912, praying that said property be stricken from the tax list. Upon hearing said petition, the prayer was denied, and plaintiffs appealed to the district court. In the district court the cause was heard upon an agreed statement of facts. That part of said agreed statement material here is as follows:

"1. That on the 23rd day of April, 1904, the Creek Nation of Indians, by P. Porter, its principal chief, by deed of conveyance or patent, conveyed unto one Sarah Smith, a freedman citizen of said nation, who had been placed on the final rolls of the citizens and freedmen of said nation, the following described real estate, situated in the City of Okmulgee, Okmulgee county, State of Oklahoma, to-wit: Lot three (3) of section seven (7), township thirteen (13) north, range thirteen (13) east, containing 41.82 acres, more or less. * * *

2. That said real estate was conveyed to the said Sarah Smith as and for her homestead, and was so designated in said conveyance, and said conveyance at the time of its execution and delivery, contained the express provision that said real estate described in said deed, should be non-taxable for twenty-one years from the date of said deed.

3. That thereafter, on the 28th day of February, 1907, the restrictions on the alienation of said real estate having been removed by the Secretary of the Interior, upon the application and petition of Sarah Smith (as alleged in the defendant's answer, and set forth

in the second cause of defense, contained in the amended answer of the defendant), the said Sarah Smith, by deed of general warranty, conveyed fee simple title to one Nathan Boyd of the following of the above described real estate: * * *, and that said deed was filed for record with the Register of deeds of Okmulgee county, Oklahoma, and was by him duly recorded in the proper records of his office. It is further agreed that at the time of said conveyance to the said Nathan D. Boyd of the lands above described, there were no improvements thereon, and that said deed contained no stipulation, reservation or agreement that said land should be exempt from taxation.

107 4. That on the 1st day of May, 1907, the said Nathan Boyd, being the owner of said real estate last described, caused said lands to be surveyed, platted and laid out into lots, blocks, streets and alleys, all according to law, and filed said plat for record, designating the same as the Capital Heights Addition to the City of Okmulgee, Oklahoma, which said plat was duly accepted by the proper authorities for said city of Okmulgee, Oklahoma, and said Addition is now a part of, and within the incorporated boundaries of said City of Okmulgee, Oklahoma, and the same lies entirely within the lands so conveyed by the Creek Nation to the said Sarah Smith, as and for her homestead.

5. That the said Sarah Smith, after July 26, 1908, having conveyed a portion of her homestead to the said Nathan Boyd as above set out, caused the remaining portions of said real estate in her said homestead as aforesaid, to be surveyed, platted and laid out into lots, blocks, streets and alleys, all according to law, and the same was duly filed for record with the register of deeds of Okmulgee county, Oklahoma, and said addition was designated as Capital Heights Addition to the City of Okmulgee, Oklahoma, and said Capital Heights' Second Addition to said City of Okmulgee, Oklahoma, is now a part of said city, and lies entirely within the incorporated limits of said city.

6. That each of the lots in each of said additions, numbered, designated and tabulated below in this paragraph set out, having been placed by the assessor for said Okmulgee county, Oklahoma, upon the tax duplicate of said Okmulgee county, Oklahoma, and upon the tax duplicates of said city of Okmulgee, Oklahoma, for taxation for the year 1912, for the valuations hereafter set forth, and a tax levied on each of said lots, as is set forth below, with the names of the owners, the valuation for taxation, the amount of the taxes charged for the year 1912, in Capital Heights Addition No. 2 to said city: * * *"

The court, on the 2nd day of February, 1914, rendered judgment reversing the order of the county commissioners and directing that the property be stricken from the tax rolls, and enjoined defendant Schock, treasurer of said county, his successors in office, from taking any steps toward the collection of any taxes, and from selling any of said property described in said proceeding. From this judgment defendants prosecute this appeal by filing their petition in error with original case-made attached.

The assignments of error necessary to be considered are: (1) The court erred in not rendering judgment for plaintiffs in error upon the agreed statement of facts submitted to the court as the evidence in the case. (2) The judgment and decree is not sustained by the evidence and is contrary to the evidence. (3) Said judgment and decree is contrary to law.

108 This record presents but one question for our determination, which is: Were the lots belonging to plaintiffs, which were originally parts of the homestead allotment of Sarah Smith, a Creek freedman, exempt from taxation in the hands of plaintiffs? This question involves the consideration of Section 16 of the Supplemental Creek Agreement (32 Stat. L. 500), commonly known as the Allotment Act, under which said lands were allotted to Sarah Smith, together with the provision of the Indian Appropriation Act herein referred to, and the act of April 26, 1906. Section 16 of the Creek Supplemental Agreement reads:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

It is the contention of plaintiffs that under this provision of the treaty, the exemption attaches to and runs with the lands in the hands of plaintiffs who purchased from the original allottee. On the other hand, defendants contend that said exemption was intended only for the benefit of and as a personal protection to the allottees, and did not attach to and become appurtenant to the land; hence, did not pass to plaintiffs. Defendants claim the authority and right to tax said property under section 19 of Act of Congress of April 26, 1906, which, in part, provides:

"That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation, as long as the title remains in the original allottee."

It is well to keep in mind the manner in which the restrictions upon alienation of this land were removed and the authority of said Sarah Smith to place this land upon the market, and the source of plaintiffs' title. The Indian Appropriation Bill of March 3, 1903, (32 Stat. L. p. 996) contains the following provision:

109 "And provided further, That nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

Sarah Smith made application to the Secretary of the Interior

under this provision of the law, and she was specifically authorized to convey the land for town site purposes, as was done in this case. It is well to remember that the State of Oklahoma, as a sovereign, has plenary power to subject all property within her domain to taxation, except such property as may have been exempted by the Enabling Act, or unless restrained by the Federal Constitution. If this property is not subject to the taxing power of the State, it must be, by reason of some specific provision exempting it from taxation by a Federal law or treaty with the Indian tribes, which provision the State has agreed to keep inviolate, or else is exempt by some provision in the Constitution. Section 1 of the Enabling Act provides:

"Provided, That nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed."

Section 22 of said Act provides:

"That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."

Article 10, section 6 of the Constitution, after naming certain property exempt from taxation, provides:

"And such property as may be exempt by reason of treaty stipulations, existing betweeen the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws."

The Enabling Act requires the State through its constitutional Convention, to adopt the Constitution of the United States, which was done by Art. 25, section 44 of said document, and it also provided that the people, through said Convention, should, irrevocably, adopt the Enabling Act, which was done by Article 25, section 45, Const.

Plaintiffs rely, principally, to sustain their contention upon the cases of Choate v. Trapp, 224 U. S. 265, English v. Richardson, 224 U. S. 680, and State v. Wilson, 7 Cranch, 164. The case of English v. Richardson, supra, involves the exemption under the Creek treaty. The court, in substance, in Choate v. Trapp, supra, announced that the exemption from taxation provided for in the Chickasaw and Choctaw Agreement was a property right, which Congress could not abrogate. The court, in the opinion, said:

"The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma."

In considering the purpose and effect of the Agreements between the Government and these different tribes of Indians, and their effect

upon the State, we must not lose sight of the fact that the State is bound only by such agreements wherein it specifically consented to be bound; and except where it expressly agreed to exempt Indian property from taxation, the right to tax remains unimpaired. The Supreme Court, in Choate v. Trapp, supra, held that the exemption from taxation for a certain period constituted a property right, which the Federal government could not withdraw or abrogate; and it necessarily follows that the State was bound by such exemption by virtue of accepting the Enabling Act, and by virtue of the provision contained in section 6, article 10 of the Constitution, wherein it specifically agreed to exempt such property as may be exempt by reason of treaty stipulations existing between the Indians and the United States government, or by Federal laws while such provisions are in force and effect. We find in the agreement involved in the case of Choate v. Trapp, supra, a provision exempting from taxtion lands granted by the Federal government, which exemption the Federal Supreme Court holds was a property right, and a right that Congress could not destroy. Certainly under this construc-
111 tion of the Federal law, this provision was in force and effect, and the State, by its Constitution, expressly agreed to exempt such property from taxation, so long as that provision remained in force and effect.

So, it will be seen that the decision in Choate v. Trapp, supra, could not have reasonably been otherwise. But here, we have an entirely different question: we are dealing with a different class of citizens, and one that is entitled to no protection, save and except that protection which every other citizen of the United States is entitled to receive. The provision as applied to these citizens must be strictly construed against granting the tax exemption; and if we fail to find it granted in specific terms and expressed in language about which there can be no doubt, the exemption does not exist. In other words, an exemption from taxation is never presumed; but in all cases of doubt as to the legislative intent, except where the rights of Indians are involved, the presumption is in favor of the taxing power. Allen v. Trimmer, (recently decided, but not yet officially reported); Wells v. Savannah, 181 U. S. 531; Tucker v. Ferguson, 22 L. ed. 805; Delaware Railroad Tax Case, 18 Wall. 206; Hoge v. Railway Co., 99 U. S., 348; Vicksburg R. R. Co. v. Dennis, 116 U. S. 665; Pickard v. Tennessee, 130 U. S. 637; Wilmington, etc. R. R. Co. v. Allsbrook, 146 U. S. 279.

On the other hand, from the foundation of our government, acts of Congress and agreements between the various Indian tribes have always been construed liberally, in favor of the Indians. This rule applies to laws relating to taxes. If was said in the case of Tiger v. Western Inv. Co., 221 U. S. 286:

"We must remember in considering this subject that the Congress of the United States has undertaken from the earliest history of the Government to deal with the Indians as dependent people and to legislate concerning their property with a view to their protection as such. Cherokee Nation v. Georgia, 5 Peters, 1, 17; Elk v. Wilkins, 112 U. S. 94, 99; Stephens v. Choctaw Nation, 174 U. S. 445, 484."

The general rule, as stated in 37 Cyc. 897, is as follows:

112 "Exemption from taxation granted by the legislature to an individual or a corporation is not a franchise, nor is it an estate or interest inherent in or running with the particular property exempted; but it is a mere privilege personal to the grantee; and unless there is express statutory authority therefor, the exemption will not pass to a successor of the corporation or to a person taking the property by sale, assignment, or by other transfer. So, in construing grants of exemption they will be construed as personal and limited to the grantee unless a contrary intention clearly appears."

Cases sustaining this text are cited from many of the states, and also from the United States Supreme Court, as follows: Rochester R. Co. v. Rochester, 205 U. S. 236; Home Ins. Co. v. Tennessee, 161 U. S. 200; Phœnix F. & M. Ins. Co. v. Tennessee 161 U. S. 174; Mercantile Bank v. Tennessee, 161 U. S. 161; Picard v. East Tennessee R. Co. 130 U. S. 637; Chicago, etc. R. Co. v. Missouri, 122 U. S. 561; Chesapeake etc. R. Co. v. Miller, 114 U. S. 176; Memphis, etc. R. Co. v. Berry, 112 U. S. 609; Louisville, etc. R. Co. v. Palmes, 109 U. S. 244; Morgan v. Louisiana, 93 U. S. 217; Armstrong v. Athens Co., 16 Pet. 281.

There is no doubt that the primary purpose of the provision of the treaty exempting the homesteads of the members of the Creek tribe of Indians from taxation for twenty-one years was for the sole benefit and protection of those Indians. Out of the one hundred and sixty acres of land conveyed to each member of said tribe, it was thought wise by the Government that each allottee should retain at least forty acres as a homestead for a period of at least twenty-one years, or during such part of said period as such allottee might live; and the Government, in carrying out this policy, undertook to throw such restrictions and safeguards around each allottee as would protect him in the possession and title of his homestead for that period of time. Thus, in addition to prohibiting the alienation of the homestead for a period of twenty-one years, exemption from taxation was likewise granted for the same period and for the same purpose. This is made clear by Mr. Justice Brewer in the case of Goudy v. Meath, 203 U. S. 146, where it was said:

"That Congress may grant the power of voluntary sale, while withholding the land from taxation or forded alienation, may be conceded. * * * But while Congress may make such pro-

113 vision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation."

Congress recognized the fact that the power in the state to tax necessarily carried with it the power to destroy, and to enforce a payment of such tax by sale of the property, should it become necessary; and no doubt this was one reason for granting the tax exemption. This reason is not in conflict with the holding of the Supreme

Court in the case of Choate v. Trapp, supra. The fact that Congress has placed this additional safeguard around the members of the Creek tribe of Indians is not inconsistent with holding that this exemption constituted a property right in the Indian. On the other hand, Congress could have had no purpose in protecting this property from taxation in the hands of speculators or other noncitizens of the tribes. It would have been an unjust, unnatural and unwarranted discrimination, which the Federal government has always studiously refrained from making. Congress required the state to provide that the property of nonresidents should not be taxed at a higher rate than the property of residents of the state, and certainly Congress did not intend that the State should exempt the property of part of its citizens from taxation, when property of the same class of citizens similarly situated is taxed. In the case of Commissioners of Miami Co. v. Breckenridge, 12 Kan. 96, Mr. Justice Brewer stated:

" 'The object of the treaty,' say the United States Supreme Court, 'was to hedge the lands around with guards and restrictions so as to preserve them for the permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale, and forfeiture, from a levy and sale for taxes, as well as the ordinary judicial levy and sale.' The purpose was effectually accomplished by the two provisions which stand side by side, one restricting leases and alienations, and the other exempting from seizure and sale. Neither should be carried further than is necessary to accomplish the purpose of the parties. When they stipulated that patents for the land might issue, 'subject to such restrictions
114 respecting leases and alienations as the President or Congress of the United States may provide,' they contemplated restrictions simply on the Indian owners, and not in subsequent white purchasers. It was not thought that, after the title had passed from the Indians to the white, there should be any restriction or limit to the latter's power of sale or lease. And if the restriction was not to be carried beyond the period of Indian ownership, why 'should the exemption be?' The two provisions are parallel; they stand side by side, and are each general in their terms. They should be construed similarly, and with reference to the obvious intent of contracting parties."

Under the Constitution, the State would be unauthorized to exempt this land from taxation, should it undertake to do so. Section 5 of article 10 of the Constitution, provides:

"The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects."

The Constitution of Minnesota contains a similar provision, and it is said by the Supreme Court of the United States, in the case of Great Northern R. Co. v. Minnesota, 216 U. S. 206:

"Now, when that purchase was made, the Territory had become a State, with a constitution expressly requiring the equal and uniform taxation of all real and personal property in the State upon a cash basis and authorized the exemption from taxation of certain

specified kinds of property, devoted to public and charitable uses; but, as we have seen, railroad property was not included among the properties that could be so exempted. It is, therefore, to be taken that the Constitution of the State after it went into operation in 1858, required all railroads to be taxed by an equal and uniform rule and on a cash basis. The State, having by its purchase become reinvested in 1860 with all the rights, franchises and privileges granted to the Minnesota and Pacific Railroad in 1857 could, speaking generally, have disposed of such interests at will, but clearly, it could not have disposed of the interests acquired by its purchase, in any manner that was inconsistent with, or which would have rendered nugatory, the requirements or injunctions of the state constitution. * * * The Legislature of the State could not, after the state constitution went into operation, have reinvested the old railroad company with such property, rights, immunities or franchises, or have transferred them to a new corporation or to a consolidated railroad corporation created by the union of prior corporations, accompanied by an exemption from taxation that was inconsistent with the constitution. * * * It was not competent for the Legislature, after the state constitution went into operation, to agree, for the State, that the payment of any given per cent of the gross earnings of the railroad corporation should be in lieu of all other taxation."

Trask v. Maguire, 18 Wall. 410; Morgan v. Louisiana, 93 U. S. 217; Louisiana & N. R. R. Co. v. Palmes, 109 U. S. 244; Railroad Co. v. Georgia, 98 U. S. 359; Keokuk & Western R. Co. v. Missouri, 152 U S. 301.

Thus, it will be seen there is no provision in the Federal
115 laws or any agreement made with the Indian tribes requiring the state to exempt this property from taxation in its present condition. Neither has the State anywhere agreed to exempt it from taxation. On the other hand, the Constitution requires that this property be taxed uniformly with all other property of its citizens subject to taxation. The purpose for which the exemption was made has ceased to exist, and the exemption itself must fall. In construing all laws, it is the cardinal rule to ascertain the intent of the lawmakers. There is nothing in this provision of the agreement, or in any prior or subsequent act of Congress dealing with these Indian tribes that evidences a purpose in Congress to grant an exemption from taxation of the property in question in the hands of third parties, who are not members of said Indian tribe. On the contrary, the provision of the act of April 26, 1906, expressly provides that the homesteads shall be nontaxable so long as the title remains in the allot-ee, which is equivalent to saying that when the title passes out of such allottee, the land shall be subject to taxation. Conclusive evidence that it was not the intention of Congress to exempt this class of property from taxation when title and possession had passed from the allottee is found in section 34 of Act of Congress of June 28, 1898, commonly known as the Curtis Bill, which section provides:

"No tax shall be assessed by any town government against any

town lot unsold by the commission, and no tax levied against a lot sold, as herein provided, shall constitute a lien on same till the purchase price thereof has been fully paid to the nation."

The case of State v. Wilson, 7 Cranch, 164, is relied upon as authority for sustaining the contention of plaintiffs. We are of the opinion, however, that this case has no application to the facts in the instant case. In that case, the state was a party to the agreement and granted the exemption, and as was held, for a valuable consideration, and in every respect constituted a valid contract which could not be abrogated on the part of the State, in that
116 it was protected by the Federal Constitution. Unlike the case at bar, the state of Oklahoma was a party to the agreement between the Creek Nation and the United States only to the extent that it agreed to exempt from taxation such property that was exempt by the Federal laws, so long as such exemption remained in force; but when such exemption ceased to exist, for any reason, the state was under no further obligation to exempt this property from taxation.

There is another reason why we are of the opinion that the contention of plaintiffs cannot be sustained, and that is: That the source of their title is in the appropriation bill of March 3, 1903, supra, permitting the allottee, Sarah Smith, to convert a part of her allotment into town site property, with the approval of the Secretary of the Interior. It was upon her application that the restrictions upon her alienation of said land were removed. At the time this application was made, the Act of Congress of April 26, 1906 was in full force and effect. Except under the act of Congress of March 3, 1903, supra, the allottee could not have alienated the lands in question; neither could plaintiffs have obtained any title to the land. Hence, it may well be said that it is by virtue of and through this act of Congress that plaintiffs obtained their title. There is no exemption from taxation contained in this law; neither is any contained in the conveyances made to plaintiffs. The law is well settled that where land is granted by a particular act, a tax exemption asserted under a prior act will not be upheld. Armstrong v. Treasurer of Athens Co, 16 Pet. 281; Lord v. Town of Litchfield, 36 Conn. 117; Southwestern R. R. Co. v. Wright, 116 U. S. 231; Wilmington & Weldon R. R. Co. v. Allsbrook, 146 U. S. 279; Ford v. Delta & Pine Land Co., 164 U. S. 662; Platte v. Rice, 10 Watts, 352. When the allottee made application to have the restrictions removed, with a view of disposing of said land for town site purposes, she did so with knowledge of the fact that it would become taxable under the act of Congress of April 26, 1906, and may well be held to have impliedly, at least, consented
117 & 118 to subject said land to *to* such burdens. Congress never required the state to exempt this land from state taxation in its present condition; neither did the State agree to so exempt it. All parties dealing with this land dealt with full knowledge of the law. The purpose for which they secured its release from Federal control and the very use to which they expected to put it was wholly inconsistent with continuing the same free from

taxation, and plaintiffs must be held to have consented to subject said property to state taxes. This is a reasonable and just construction, in harmony with equity and sound principles. It is likewise in harmony with the views of Justice Brewer, in the case of Commissioners of Miami Co. v. Breckenridge, supra, wherein it is said:

"No government can exist, without revenue; there can be no revenue without taxation, and there can be no taxation without property. We claim, then, that the federal government under the Constitution of the United States, has no power to dispose of the public lands, or to assent to the disposal of them to individuals in fee simple in such a way as to deprive the state of the exercise of its sovereign right to tax them. So long as the lands remain Indian lands, or so long as the government retains an interest in or control over them, the state, by compact in the act of admission, is prohibited from exercising the taxing power in relation to them. But the moment the title passes out of the government, and is vested in individuals, the lands become subject to all the laws of the jurisdiction where they are located."

We therefore hold that the property involved is not exempt from taxation; that the judgment of the trial court is contrary to law and erroneous, and must be reversed, with directions to set aside the judgment and render judgment for defendants. It is so ordered.

All the Justices concur, except Kane, C. J., absent and not participating.

* * * * * * *

119 In the Supreme Court of the United States.

No. —.

CORNELIA SWEET et al., Appellants,
vs.
ELMER E. SCHOCK et al., Appellees.

Designation of Error Relied on by Appellants and Portions of Record to be Printed.

To the Hon. Clerk of the Supreme Court of the United States:

The appellants will rely upon all the assignments of error as found on pages four (4) to six (6) inclusive of the record, and they think the following parts of the record are necessary for the consideration thereof, viz:

1. The Petition in the District Court, record pp. 19 to 23 inc.
2. The Application, Order and Notice of Appeal before the Board of County Commissioners, record pp. 30 to 34 inc.
3. The Amended Answer, record pp. 58 to 69 inc.
4. The Demurrer on record p. 71.
5. The Decree sustaining demurrer, record p. 73.
6. The Stipulation on record pages 75 to 76 inc.
7. The Agreed Statement of Facts, record pp. 78 to 84 inc.

8. The Decree record pp. 86 to 89 inc.
9. The Motion for New Trial record pp. 92 to 93 inc.
10. The Petition in Error record pp. 14 to 15 inc.
11. The Order of Reversal record p. 104.
12. The Opinion of the Supreme Court record pp. 105 to 117 inc.
13. The Assignments of error record pp. 4 to 6 inc.

If customary to print the citation, writ of error, order allowing writ of error and bond into the record, you will do so, which you will find record pp. 1, 2, 3, 7, 8, 9, 10 and 11 inc.

MERWINE & NEWHOUSE,
HERBERT E. SMITH,
Attorneys for Appellants.

Service of a copy of the above is acknowledged this 23rd day of November, 1915.

J. W. CHILDRES,
ORLANDO SWAIN,
R. E. SIMPSON AND,
FRED M. CARTER,
Attorneys for Appellees.

—— ——,
County Attorney, Okmulgee County, Oklahoma.

120 [Endorsed:] 726/25009. In the Supreme Court of the United States. No. —. Cornelia Sweet et al., Appellants, vs. Elmer E. Schock et al., Appellees. Designation of errors relied on by appellants and part of the record to be printed. Merwine & Newhouse, Herbert E. Smith, Attorneys for Appellants, Okmulgee, Oklahoma.

121 [Endorsed:] File No. 25009. Supreme Court of U. S., October term, 1915. Term No. 726. Cornelia Sweet et al., Appellants, vs. Elmer E. Shock et al. Statement of errors to be relied upon and designation by appellants of parts of record to be printed. Filed November 27, 1915.

Endorsed on cover: File No. 25009. Oklahoma Supreme Court. Term No. 299. Cornelia Sweet, J. A. Price, Mabel H. Price et al., plaintiffs in error, vs. Elmer E. Schock, as Treasurer of Okmulgee County, State of Oklahoma, et al. Filed November 27th, 1915. File No. 25009.

No. [redacted]

In the

Supreme Court of the United States

October Term, 1916.

CORNELIA SWEEZY A. PRICE, et al.,

Plaintiffs in Error,

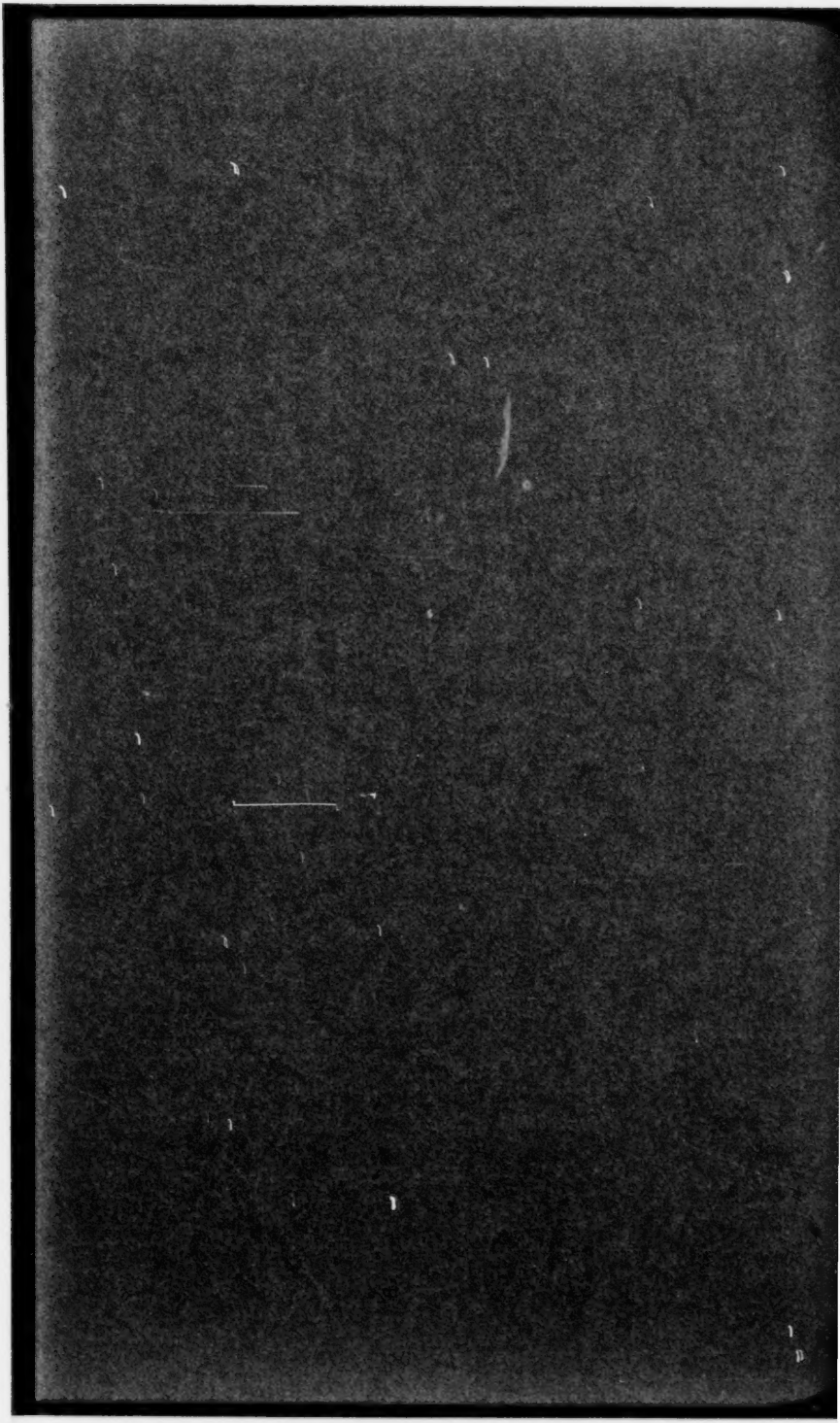
vs.

ELMER E. SCHOCK, as Treasurer of Washington County, State of Oklahoma, et al.,

Defendants in Error.

IN error to the district court of the state of Oklahoma.

BRIEF FOR PLAINTIFFS IN ERROR.



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FEDERAL STATUTES CITED:

CASES CITED:

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 299.

CORNELIA SWEET, J. A. PRICE, *et al.*,

Plaintiffs in Error,

vs.

ELMER E. SCHOCK, as Treasurer of Okmulgee County, State of Oklahoma, *et al.*,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *for* PLAINTIFFS *in* ERROR.

Statement of Case.

This action was begun by plaintiffs in error who were owners of certain lots, with the improvements thereon, in the City of Okmulgee, Oklahoma. All claimed title to lots in the same additions through mesne conveyance from the deed of a freedman cit-

izen of the Creek Nation to whom the land had been patented by said nation through conveyance designated by the Federal Government as a homestead deed.

The owners of these lots under and by virtue of the statutory provisions of that state, filed before the Board of County Commissioners of said county their application, asking said board to strike their property, which was specifically described in said application, from the tax duplicates of the county, and that the said several sums, designated in said application, be cancelled, set aside and held for naught. (See Tr., p. 10.)

The application charged that the lots designated could not be placed on the tax duplicate nor taxed because all of the lots were a part of the lands which were given to one Sarah Smith, by the Creek Nation, as and for her share of the lands of said nation, and said lands by Act of Congress were non-taxable for 21 years from the date of her patent thereto, and that her deed for the same from the Creek Nation, contained in it the express provision that said lands were non-taxable for said period. (See Tr., pp. 10, 11 and 12.)

The Board of County Commissioners, on hearing of this matter, by order entered on the minutes of their proceedings, rejected the application, refus-

ing to strike the same from the duplicate or to strike therefrom the levies already made. (See Tr., p. 13.) And an appeal was taken from this action of the Board of Commissioners to the District Court of said county. (See Tr., pp. 13, 14 and 15.)

While said matter was thus pending on appeal in the District Court of Okmulgee County, Oklahoma, said lot owners filed their petition in said court against said board and the treasurer of said county in which they set out the same facts as in the application before the commissioners, and they further charged that notwithstanding their application under the statute to strike the property from the duplicate, the treasurer of the county was proceeding to place a penalty thereon and to sell the same. (See Tr., pp. 7, 8 and 9.)

To this petition, the treasurer and commissioners answered and as a first defense, alleged in brief that the values placed on each lot is much below the cash value of the lot, and that all of the lots are improved with valuable improvements.

As a second defense the answer averred that the Act of Congress approved March 3, 1903, provided that said land might be used for townsite purposes; that by the Act of April 26, 1906, it was provided that all lands on which restrictions were removed be-

came taxable, and that on February 1, 1907, the Secretary of the Interior removed the restrictions on the lands in controversy, and that it was conveyed by said allottee, Sarah Smith, thereafter for townsite purposes.

For a third defense said answer alleged that by the Act of May 27, 1908, the restrictions on her land were removed, and that if plaintiffs were the owners of said land they became such after that date, and they purchased subject to said provision.

For a fourth defense, the answer set forth that the city voted bonds for large amounts for water and sewer systems, and the complaining property owners were enjoying the use and benefit of the same, and that a part of the tax complained of was levied on account of the water and sewer systems.

The remaining defenses of the answer are in effect repetitions of the above last defense.

There was filed in said cause and made a part of the record thereof an agreement that the cause of Cornelia Sweet and others above named against Elmer E. Schock, as treasurer of Okmulgee County, Oklahoma, and the case of Cornelia Sweet, in the matter of the taxation of the property of Cornelia Sweet and others, before the Board of County Commissioners of Okmulgee County, Oklahoma, which said

last cause has been brought to this court from the action of the Board of County Commissioners of Okmulgee County, by said plaintiffs, and in which is involved the same property as in said first cause should be consolidated, and that all pleadings filed in either cause should be considered as filed in both cases; and that the amended answer of the Board of County Commissioners of Okmulgee County, filed in the action on the 11th day of October, 1913, should be amended and should also be considered as the answer of said treasurer of said county, and that both of said causes so merged should be submitted to the court upon one agreed statement of facts, which said statement of facts so agreed to is this day filed and submitted to the court. (See Tr., p. 27.)

Agreed Statement of Facts.

The agreed statement of facts referred to in the foregoing, or the case stated, is as follows:

" *1.* That on the 23rd day of April, 1904, the Creek Nation of Indians, by P. Porter, its principal chief, by deed of conveyance or patent, conveyed unto one Sarah Smith, a freedman citizen of said nation, who had been placed on the final rolls of the citizens and freedmen of said nation, the following described real estate, situated in the City of Okmulgee, Okmulgee County, State of Oklahoma, to-wit:

Lot three (3) of section seven (7) township thirteen (13) north, range thirteen (13) east, containing 41.82 acres, more or less,

and said patent was duly approved by the Secretary of the Interior as required by law, a copy of which patent is as follows:

" 'Homestead Deed No. ———

" 'Creek Freedman Roll No. 332.

" '*To All to Whom these Presents Shall Come, Greeting:*

" '*Whereas*, by the Act of Congress approved March 1, 1901 (31 Stat. 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, shall be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each, an equal share of the whole in value, as nearly as may be; and

" '*Whereas*, It was provided by said Act of Congress, that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead, for which he shall have a separate deed; and

" '*Whereas*, the said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Sarah Smith, a citizen of said tribe as a homestead:

" 'Now, *therefore*, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said Sarah Smith all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said nation in and to the following described land, *viz.:* Lot three (3) of section seven (7), township thirteen (13) north, and range thirteen (13) east of the Indian base and meridian, in Indian Territory, containing forty-one and 82/100 acres, more or less, as the case may be, according to the United States survey thereof; *subject, however, to the conditions provided by said Act of Congress, and which conditions are that said lands shall be non-taxable and inalienable* and free from any incumbrance whatever for 21 years; and subject, also, to the provisions of the Act of Congress, relating to the use, devise and descent of said land after the death of the said Sarah Smith and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

" 'In witness *whereof*, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said nation to be affixed this 23rd day of April, A. D. 1904.

P. PORTER,

" '(Seal) 'Principal Chief of Muskogee (Creek) Nation.

"

" 'L. R. S. Department of the Interior. Approved May 23, 1904, Thomas Ryan, Acting Secretary, By Oliver G. Phelps, Clerk. Filed for record on 1st day of June, 1904, at 11 o'clock, A. M., and recorded in Book W, page 501. Recorded in Register of Deeds' Office in Book H-2, page 305.'

" 2. That said real estate was conveyed to the said Sarah Smith as and for her homestead, and was so designated in said conveyance, and said conveyance at the time of its execution and delivery, contained the express provision that said real estate described in said deed, should be non-taxable for twenty-one years from the date of said deed.

" 3. That thereafter, on the 28th day of February, 1907, the restrictions on the alienation of said real estate having been removed by the Secretary of the Interior, upon the application and petition of Sarah Smith (as alleged in the defendant's answer, and set forth in the second cause of defense, contained in the amended answer of the defendant), the said Sarah Smith, by deed of general warranty, conveyed fee simple title to one Nathan Boyd of the following of the above described real estate:

Beginning at the southwest corner of said lot three (3), section seven (7), township thirteen (13) north, range thirteen (13) east; thence east along the south line of said lot three (3), to a

point about 399 feet west of the southeast corner of said lot three (3), thence north to a point intersecting the north line of said lot three (3), 399 feet west of the northeast corner of lot three (3), thence west to the northwest corner of said lot three (3), thence south along the west line of said section seven (7), to the point of beginning, together with all the improvements thereon, less 1.69 acres occupied as the right-of-way of the Ozark & Cherokee Central Railway Company,

and that said deed was filed for record with the Register of Deeds of Okmulgee County, Oklahoma, and was by him duly recorded in the proper records of his office. It is further agreed that at the time of said conveyance to the said Nathan D. Boyd of the lands above described, there were no improvements thereon, and that said deed contained no stipulation, reservation or agreement that said land should be exempt from taxation.

" 4. That on the 1st day of May, 1907, the said Nathan Boyd, being the owner of said real estate last described, caused said lands to be surveyed, platted and laid out into lots, blocks, streets and alleys, all according to law, and filed said plat for record, designating the same as the Capital Heights Addition to the City of Okmulgee, Oklahoma, which said plat was duly accepted by the proper authorities for said City of Okmulgee, Oklahoma, and said Addition is

now a part of, and within the incorporated boundaries of said City of Okmulgee, Oklahoma, and the same lies entirely within the lands so conveyed by the Creek Nation to the said Sarah Smith, as and for her homestead.

" 5. That the said Sarah Smith, after July 26, 1908, having conveyed a portion of her homestead to the said Nathan Boyd as above set out, caused the remaining portions of said real estate in her said homestead as aforesaid, to be surveyed, platted and laid out into lots, blocks, streets and alleys, all according to law, and the same was duly filed for record with the Register of Deeds of Okmulgee County, Oklahoma, and said addition was designated as Capital Heights Addition to the City of Okmulgee, Oklahoma, and said Capital Heights' Second Addition to said City of Okmulgee, Oklahoma, is now a part of said city, and lies entirely within the incorporated limits of said city.

" 6. That each of the lots in each of said additions, numbered, designated and tabulated as below in this paragraph set out, have been placed by the assessor for said Okmulgee County, Oklahoma, upon the tax duplicate of said Okmulgee County, Oklahoma, and upon the tax duplicates of said City of Okmulgee, Oklahoma, for taxation for the year 1912, for the valuations hereafter set forth, and a tax

levied on each of said lots, as is set forth below, with the names of the owners, the valuation for taxation, the amount of the taxes, charged for the year 1912, in Capital Heights Addition No. 2 to said city:

" Name	Lot No.	Block	Value	Tax
Cornelia Sweet	1	12	$ 300.00	$11.78
Cornelia Sweet	2	12	1500.00	58.88
J. L Peacock	6	12	250.00	9.81
J. L. Peacock	7	12	250.00	9.81
Adeline Pell	10	12	650.00	25.59
W. L. Merwine	3	12	500.00	19.63
W. L. Merwine	4	12	225.00	8.83
W. L. Merwine	5	12	225.00	8.83
W. R. Alexander	3	10	75.00	2.49
Walter Weimer	10	10	200.00	7.85
Walter Weimer	11	10	200.00	7.85
Walter Weimer	12	10	225.00	8.85
Bessie Hill	1	11	30.00	1.18
Bessie Hill	2	11	30.00	1.18
Bessie Hill	3	11	30.00	1.18
Bessie Hill	4	11	30.00	1.18
Bessie Hill	11	11	100.00	3.92
Bessie Hill	12	11	100.00	3.92
Cora M. Smith	12	9	579.00	22.56
J. P. Snook	2	9	25.00	.99
J. P. Snook	3	9	25.00	.99
J. P. Snook	4	9	25.00	.99
J. P. Snook	5	9	25.00	.99
J. P. Snook	6	9	25.00	.99
J. P. Snook	7	9	100.00	3.92
J. P. Snook	8	9	100.00	3.92
J. P. Snook	9	9	275.00	10.79

" The following are the lots, the names of the owners, the valuation of the same for taxation, and the amount of taxes charged for the year 1912, as placed upon the duplicate by the assessor and treasurer for said County of Okmulgee, Oklahoma, in Capital Heights Addition No. 1, aforesaid:

" Name	Lot No.	Block	Value	Tax
Bessie Hill	2	8	$ 250.00	$ 9.81
Bessie Hill	3	8	1050.00	41.21
R. L. Sartain	14	3	200.00	7.85
R. L. Sartain	15	3	600.00	23.55
J. R. Schoy	5	5	1550.00	60.84
James C. Carney	4	6	1550.00	60.84
Bertha D. Terry	18	3	250.00	9.81
Bertha D. Herry	19	3	450.00	17.65
H. E. Smith	2	5	150.00	5.89
H. E. Smith	3	5	1500.00	58.88
Cora M. Smith	2	5	150.00	5.89
Cora M. Smith	1	5	450.00	16.69
Grace A. Hall	1	6	1500.00	58.88
Grace A. Hall	2	6	150.00	5.89
John T. Hall	22	6	300.00	11.77
J. L. Newhouse	5	4	300.00	11.77
J. L. Newhouse	6	4	1550.00	60.84
Coit C. Almy	2	6	150.00	5.89
Coit C. Almy	3	6	1700.00	66.73
Coit C. Almy	16	7	175.00	6.86
Coit C. Almy	11	8	800.00	31.40
J. A. Price	7	4	1500.00	58.80
J. A. Price	11	3	500.00	19.63
J. A. Price	11	5	265.00	11.79
J. A. Price	12	6	300.00	11.78
Mabel H. Price	6	6	750.00	29.45

" 7. That the plaintiffs, or the applicants herein are each the owner in fee simple, of the lots designated above as belonging to them, and so placed upon the tax duplicates of said county, and the title to each of said lots above described and so belonging to said plaintiffs or applicants herein, passed to each of them by successive conveyances or chain of title, from the said Nathan Boyd and Sarah Smith, aforesaid, each of said conveyances being in due form of law, and each operating to convey title to said real estate, in the chain of title thereof, from the said Sarah Smith and Nathan Boyd, to each of the aforesaid present owners of each of said lots, all of which is disclosed by the record title to said real estate, as the same appears of record in the various public records of said county and state.

" 8. It is further agreed that none of the deeds so made by the said Sarah Smith and Nathan Boyd, to any of their several grantees, contain any resrevation or agreement that any of said lands should be exempt from taxation.

" 9. It is further agreed that all of the improvements on said lots and parcels of land described herein were placed thereon by persons other than the said Nathan Boyd and Sarah Smith and that all of said improvements were on said lands at the time said taxes complained of, were levied and assessed against said property.

" *10.* That unless the restraining order herein is made perpetual by the District Court of Okmulgee County, Oklahoma, the present treasurer of said county will proceed to sell the above described lands and lots so belonging to the plaintiffs, or applicants herein, for the payment of the alleged taxes assessed against the same, and he will place a penalty of eighteen per cent, thereon, and will sell the real estate for the purpose of collecting said taxes, and the penalty so placed thereon." (See Tr., p. 27 *et seq.)*

Decree.

Upon the issues there made by the pleadings, stipulation and agreed statement of facts in both causes the court made and entered the following decree in the case:

" Now on this the 2nd day of February, 1914, this cause came on to be heard upon the application or petition herein on appeal from the action of the Honorable Board of County Commissioners of Okmulgee County, State of Oklahoma, the amended answer thereto of the said Board of County Commissioners and the reply to said answer by said appellants and the agreed statement of facts filed therein, and also upon the petition of the said Cornelia Sweet *et al.* against the treasurer of said Okmulgee County,

Oklahoma, for an injunction, the amended answer thereto of the said treasurer of said Okmulgee County, Oklahoma, and the reply thereto of Cornelia Sweet *et al.* and the agreed statement of facts, and said causes were heard by the court upon the evidence, and the argument of counsel, and upon due consideration thereof, the court being advised, finds that said action of the Board of County Commissioners in refusing to allow the petitioners before them the relief asked for should be reversed and set aside, and that the injunction heretofore allowed herein against said Elmer E. Schock, as treasurer of said county, and his successor in office should be made perpetual.

" *It is therefore ordered, adjudged and decreed,* that the action of the Board of County Commissioners in refusing to allow the petitioners the relief asked for in the proceedings had before said Board be, and the same are hereby reversed, set aside and held for naught, and that the said Board of County Commissioners of Okmulgee County, Oklahoma, or their successors in office be, and they are hereby ordered and directed to strike, or cause to be stricken from the duplicate of Okmulgee County, Oklahoma, the following list of taxes against the real estate hereinafter designated for the years therein designated, and to strike from the tax duplicate of said county

and state the following lots in said Capital Heights Addition to the City of Okmulgee, Oklahoma, to-wit:

* * * * * * * *

" And to strike, or cause to be stricken from the tax duplicate of said county and state the following lots belonging to the following owners thereof, and the following amounts of tax assessed against the same for the years therein designated in said Capital Heights Addition No. 2 in the said City of Okmulgee, Oklahoma, to-wit:

* * * * * * * *

" To all of which the said Elmer E. Schock, treasurer of Okmulgee County, Oklahoma, and his successor in office and the Board of County Commissioners of Okmulgee County, Oklahoma, and their successors in office respectively except.

" *It is further considered, adjudged and decreed,* that the said Elmer E. Schock, as treasurer of Okmulgee County, Oklahoma, and his successors in office be, and they are hereby enjoined from selling any of the above lots mentioned and designated in the proceedings herein and from placing any penalty on any thereof, or from taking any step towards the collection of these taxes, while this proceeding is pending in this court or to any court to which these proceedings may be properly appealed, to all of which the said treasurer of said county and his successor in

office and the said Board of County Commissioners of said county respectively except.

" Thereupon, on the same day, the said treasurer of Okmulgee County, and said Board of County Commissioners of said county filed their motion herein for a new trial and the same was heard by the court and overruled, and thereupon the said Elmer E. Schock, as treasurer of said county and his successor in office, and said Board of Commissioners of said county and state and their successors in office respectively excepted.

" And it having been made to appear to the court that the said A. E. Carney does not desire to further prosecute this appeal as to him, and said suit and injunction as to him are dismissed.

" *Whereupon*, the treasurer of Okmulgee County, Oklahoma, and the Honorable Board of County Commissioners of Okmulgee County, Oklahoma, prayed an appeal to the Supreme Court of the State of Oklahoma, which is granted, and for cause shown an extension of thirty days was given to prepare and serve a case-made, and the said Cornelia Sweet *et al.* suing in like capacity are given ten days thereafter in which to suggest amendments thereto, and said case-made is to be settled upon five days' notice.

" MERWINE & NEWHOUSE, *Attys.*"

(See Tr., p. 33 *et seq.*)

The defendants filed their motion for new trial, which was overruled and the treasurer and commissioners prosecuted error to the Supreme Court of the state, and the latter reversed the court below, with directions to set aside the judgment and render judgment for the commissioners and the treasurer of said county. (See Tr., pp. 37 and 38.)

The property owners are now here in this Honorable Court by petition in error.

ASSIGNMENTS *of* ERROR.

As ground of error and reversal of the action and ruling of the Supreme Court of the State of Oklahoma, they say:

(a) That said judgment and decree is contrary to, and in violation of the covenants contained in the homestead patent, dated April 23, 1904, from the Creek Nation to one of the Five Civilized Tribes of Indians, duly approved by the Honorable Secretary of the Interior, Sarah Smith, a freedman citizen of said Creek Nation, and which covenant is in words and figures following:

* * * * * * * *

Subject, however, to the conditions of said Act of Congress, and which conditions are that said lands shall be *non-taxable* and inalienable and free from any incumbrance whatsoever for twenty-one years.

(b) That said judgment and decree are contrary to, and in violation of the following provisions and covenants contained in section 7 of the Original Creek Agreement, approved March 1, 1901, 31 Stat. L. 861, to-wit:

> " Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above."

(c) That said judgment and decree is contrary to, and in violation of, the following provisions contained in Sec. 16, of the Supplemental Creek Agreement approved June 30, 1902, 32 Stat. L. 500, to-wit:

> " Each citizen shall select from his allotment, forty acres of land or a quarter of a quarter section as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever, for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

(d) That the provisions of section 19, of the Act of Congress of April 26, 1906, 34 Stat. L. 137, relating to the Five Civilized Tribes, of which said Creek Nation is one, to-wit:

> " That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as title remains in the original allottee;"

and the provisions of section 4 of the Act of Congress of May 27, 1908, relating to said Five Civilized Tribes, to-wit:

> " That all lands from which restrictions have been or shall be removed shall be subject to taxation. * * * "

are each and both contrary to, and in violation of, the 5th amendment to the Constitution of the United States, and contrary to, and in violation of, article 1, section 10, of said Constitution.

(e) That said judgment and decree is contrary to and in violation of article 2, section 15 of the Constitution of the State of Oklahoma.

THE LAW OF THE CASE.

These assignments of error present but one question for the determination of this court. And all of the assignments of error will be discussed under this proposition:

Did Congress, after making this land non-taxable by valid enactment, and by valid enactment authorizing and directing a deed to be made to the allottee which should and which did, covenant that the land was so non-taxable, then later destroy this right by subsequent legislation?

The following are the provisions of the Federal law under and by virtue of which the lands in question were allotted to the said Sarah Smith:

> " All lands of said tribe, except as herein provided, shall be allotted to the members of said tribe by said commission, so as to give to each an equal share of the whole in value, as nearly as may be, in the manner following:
>
> " There shall be allotted to each citizen one hundred and sixty acres of land. * * *
>
> " Lands allotted to the citizens hereunder shall not in any manner whatsoever, or at any time be encumbered, taken or sold to secure or

satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

" Each citizen shall select from his allotment forty acres of land as his homestead, which shall be *non-taxable* and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed *conditioned as above.*"

—Sec. 1, Act of March 1, 1901
(30 Stat. L. 861).

" Immediately after the ratification of this agreement by Congress and the tribe * * * the principal chief shall deliver * * * a deed conveying to him all right, title and interest of the Creek Nation in * * * the lands embraced in his allotment certificate."

—Sec. 22, Act of March 1, 1901
(30 Stat. L. 861).

" Any allottee, accepting such deed, shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided herein and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of the lands reserved from allotment."
—*Ibid.*

Keeping in mind, throughout the course of this argument, that by this law, Sarah Smith, by accepting her deed for the lands sought to be taxed herein, surrendered all her rights she had in common with the other members of the tribe, to the tribal lands, we then fix a valuable right surrendered by her for which she received this land, and for which the Federal Government, by Act of Congress, and the Creek Nation, by exact stipulation in her deed, both agreed that the land therein described should not be subject to any tax for a period of twenty-one years.

The Supreme Court of the United States so decided. We here quote from the opinion in the case:

> " The individual Indian had no title or enforcible right in the tribal property. But as one of those entitled to occupy the land he did have an equitable interest which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim to the other property of the tribe formerly held for their common use. For the Atoka Agreement, after declaring that 'all land allotted should be non-taxable,' stipulated further that each enrolled member of the tribe should receive a patent framed in conformity with the agreement, and that each Choctaw and

Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement, and to relinquish all of his right in the property formerly held in common.

" There was here then, an offer of non-taxable land. Acceptance by the party to whom the offer was made, with the consequent relinquishment of all claims to other lands, furnished a part of the consideration, *if, indeed, any was needed* in such case, to support either grant or the exemption. *Wisconsin etc.* v. *Powers*, 191 U. S. 379; *Home* v. *Rouse*, 8 Wall. 430; *Tomlinson* v. *Jessup*, 15 Wall. 454. Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and like a grantee in a deed poll, or a person accepting a conveyance, bound by its terms, although it was not actually signed by him. *Teller* v. *Ashford*, 133 U. S. 610; *Hendrick* v. *Lindsay*, 93 U. S. 143.

" As the plaintiffs were offered the allotment on the conditions proposed; as they accepted the terms and, in the relinquishment of their claim, furnished a consideration which entitled them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were.

" On the part of the state it is argued that there was, in fact, no tax exemption, but that that provision was only intended to guard absolutely against the alienation of the land whether for taxes, or at judicial sale, or by private contract. In other words, it is said that the tax

exemption was only an additional prohibition against the sale, so that when the restrictions against alienation were removed by the Act of 1908 (35 Stat. 312), the provision as to non-taxability went as a necessary part thereof. * * *

" The right to remove the restrictions was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. *But the provision that the land should be non-taxable was a property right which Congress undoubtedly had the right to grant.* That right fully rested in the Indians and was binding upon Oklahoma."

—*Choate* v. *Trapp*,
224 U. S. 671,
56 L. ed. 941.

At the same time the court handed down this decision it handed down another following and adopting the language of it to the effect that the Creek homesteads were non-taxable,

—*English* v. *Richardson*,
224 U. S. 680,
56 L. ed. 945.

The following are the terms and provisions of the Act of May 27, 1908, 35 Stat. 312, referred to by Mr. Justice LAMAR in his opinion in *Choate* v. *Trapp*, *supra*, and which he says could not abrogate the agreement in the deed making the land non-taxable:

> " All lands from which restrictions have been removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."
>
> —Sec. 4, Act of May 27, 1908
> (35 Stat. L. 312).

From this, we take it that it squarely holds that the State of Oklahoma has no right to tax the lands in this action while in the hands of the original allottee and that the land is not subject to the provision of the Act of May 27, 1908, which attempted to tax all of the land from which the restrictions had been removed, regardless of the terms of the law and the provisions in the homestead deed of an allottee. As both of these questions by this decision, are no longer open questions, we now pass to the question as to whether the provision in the first homestead deed by its terms and by the Act of Congress under which it is made, is a covenant that will extend to each successive grantee in the chain of title, though set forth in no other deed than the first deed to Sarah Smith.

It was stated in the above case, when speaking of the nature and extent of the rights conferred upon the allottee by the terms of his patent, which said that this land should be non-taxable for a period of

twenty-one years, that "*the patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as to the land itself.*" *Choate* v. *Trapp, supra.* If this be true, *as so held by this high court*, then a conveyance of the land passed this non-taxable exemption as fully as if it had said that it was made a part of the grant conveyed.

The Act of Congress under which this deed was made and this real estate was exempted from the burden of taxation for this period of time created a *valuable right.* It enhanced the value of this particular land so conveyed to Sarah Smith. Having created this valuable right, and Sarah Smith having given a valuable consideration to support it, it could not be impaired by subsequent legislative enactment. It remained in the land and a part of it during the entire period of exemption, even though all of the deeds after the patent to Sarah Smith did not contain any reference to it. This proposition was under consideration by the Supreme Court of the United States, early in its history, and was made clear by that illustrious judge, Chief Justice MARSHALL, in a case where lands were granted the Indians exempt from tax, and after they had sold them, the state undertook to make the lands taxable.

From the facts in the case it appeared that the Delaware Tribe of Indians had claims to lands in

the state of New Jersey which they desired to release and whose title the state desired to accept. An agreement was entered into by which the Indians were to release certain lands, and the government was to purchase another tract for them on which they might reside, which lands so purchased for them should "not thereafter be subject to any tax." Under this agreement the Indians were conveyed the lands and were put into the possession thereof. Afterwards desiring to join some of their people in another state, they applied for and obtained an act of the Legislature of New Jersey authorizing a sale of these lands. This act made no mention of the tax exemption, and the lands in question were bought by the plaintiffs, but their deeds under which they claimed title did not mention in any way that the lands were not subject to any tax. An attempt was made upon the part of the state to impose a tax on their lands and this was successfully resisted. In this first case on this subject, that eminent judge laid down the following principles:

> " Every requisite to the formation of a contract is found in the proceeding between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect was made, the terms stipulated, the

consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then in consideration, of the arrangements previously made, one of which is stated to be the non-tax provision, the Indians executed their deed of cession. This is certainly a contract clothed with forms of unusual solemnity. *The privilege though for the benefit of the Indian, is annexed by the terms which created it, to the land itself, not to their persons.*"

—*State* v. *Wilson*,
7 Cranch. 164 (U. S.).

The language above quoted was approved and quoted in *Choate* v. *Trapp, supra.*

It was further said in the opinion in this case just cited that "it is to their advantage that it should be annexed to the land because that in the event of a sale, on which alone the question could become material, the value would be enhanced by it."

—*State* v. *Wilson, supra.*

The court will find this proposition discussed in the following authorities:

Thompson v. *Hallou*,
No. 13958, 23 Fed. Cases 1049;
Pondexter v. *Greenshaw*,
114 U. S. 270;
Cooley's Constitutional Limitations,
7th ed., p. 395.

Suppose the Legislature of the State of Oklahoma, for certain reasons of public policy, had, by valid enactment, said that certain specifically described lands in each township of the state, should not be taxed for a certain period of years. Would it be contended that in order that the parties who own this land at the time and after this enactment, in order that they might pass the right to their grantees, would have to insert this provision in the deed of conveyance? It would be hard to find any one with the courage to argue such a proposition.

But what difference is there between the question last stated and the one at bar? Because the act in the case as bar is by Congress and the party to be benefited is an Indian, does not in anywise alter the law or the common sense of the proposition. The enactment became the law of the land, and in the case at bar it would have attached to the land, even if the provision had not been inserted in the homestead deed of the allottee.

The Supreme Court of the State of Oklahoma, in *Weilup* v. *Audrian*, 128 Pac. 254, 36 Okla. 288, has decided that there is practically no difference between the law making the homestead of the Cherokee, the Choctaw, the Chickasaw, and Creek Indians free from the burden of taxation for this period, and the law placing the tax burden on the lands on which the re-

strictions have been removed. It holds also that the provisions in each attempting to place the tax back on land from which the restrictions have been removed are of no force or effect. This case follows *English* v. *Richardson, supra*, and *Choate* v. *Trapp, supra.*

If this provision in the patent on the part of the grantor, exempting this land from taxation, is a covenant running with the land, it will be conceded, no doubt, that subsequent holders of the title could claim the exemption even if it should not have been mentioned in each of their deeds, and even if the Supreme Court of the United States had not spoken as it has in the above cases.

From a careful reading of the many decisions of the courts of last resort in the several states, we deduce the following definition for the expression, "a covenant running with the land:"

That covenant is said to be incident to the land and binding upon those in whom it subsequently vests where there is a privity of estate between the parties, and the covenant is one about or affecting the land devised or granted, and tends directly and necessarily to enhance its value or render it more beneficial by whom it is owned or occupied.

—Tiedman on Real Property,
Sec. 862 *et seq.;*

Spencer's Case,
1 Smiths Leading Cases 174;
2 Tiffany Modern Law of Real Estate;
Post v. *Karney*,
51 Am. Dec. 303 (N. Y.);
Hurst v. *Rodney*,
1 Wash. 375;
Worthington v. *Hughs*,
19 O. S. 67;
Woolescraft v. *Norton*,
15 Wis. 198;
Conduit v. *Ross*,
102 Ind. 166;
Norman v. *Wells*,
17 Wend. 136.

It was claimed by the other side in the courts below, and it will be claimed here, that by virtue of Sec. 4 of said Act of May 27, 1908, which says that "all lands from which restrictions have been removed, shall be subject to taxation," the right to tax this land was restored to the state; thus claiming a right that is unconstitutional. While Congress in the making of a law for the Indian has the right to amend or repeal a previous law, yet it can not by any amendment or repeal destroy contractual rights under the first law. This was a principle which the court declared in *Choate* v. *Trapp, supra*, from which we quote the following:

> " There is a broad distinction between the power to abrogate a statute and destroy rights acquired under it; and while Congress under its plenary power over Indian Tribes, can amend or repeal an agreement by a later statute, it can not destroy existing individual property rights acquired under a former statute or agreement."

A careful reading and study of the opinion of the learned judge of the Supreme Court of the State of Oklahoma (Tr., p. 39 *et seq.)* discloses that there is no discussion therein of this constitutional question. It may have been the intention of the learned judge to answer the question broadly by stating other grounds why this land should be taxed. But one is impressed that the court below committed error in not giving this phase of the controversy, a proper consideration.

The other side in the courts below undertook to make the point that the parties ought not to object to the payment of these taxes. This is not an argument, nor is it any argument to say that it may become a duty to oppose the imposition of certain unlawful taxes which are collected in certain portions of our country. If more of our people would resist the exaction of *ualawful taxes*, our tax officials would have less trouble with the people in the collection of the public revenues.

It is to be noted that the parties to this brief are not resisting the city assessments for street, sidewalk, sewer assessments and the like.

The foregoing is submitted with full confidence that this court will reverse and set aside the judgment of the Supreme Court of the State of Oklahoma, and affirm the judgment of the District Court of Okmulgee County, Oklahoma.

Respectfully submitted,

HERBERT E. SMITH,
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Attorneys for Plaintiffs in Error.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 299.

CORNELIA SWEET, J. A. PRICE *et al.*,

Plaintiffs in Error,

vs.

ELMER E. SCHOCK, as Treasurer of Okmulgee County, State of Oklahoma, *et al.*,

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REPLY BRIEF OF PLAINTIFFS IN ERROR.

With the indulgence of the court we desire to reply briefly to the argument contained in the brief of the defendants in error.

The tax exemption attached to and ran with the land and exists in favor of the vendee of the allottee of the land for the full period of twenty-one years fixed by law and the terms of the grant which created the title.

The Act of Congress of March 1, 1901 (31 Stat. L. 861), which provides for the allotment of land to the enrolled citizens of the Creek Tribe or Nation of Indians in section 7 thereof provides:

> "Each citizen shall select from his allotment 40 acres of land as a homestead which shall be nontaxable and inalienable and free from any encumbrance whatever for 21 years, for which he shall have a separate deed, conditioned as above, *provided,* That selection of homesteads for minors, prisoners, convicts, incompetents, aged and infirm persons who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him."

In section 23 of the same act it is provided:

> " Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal

chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

" * * * * * * *

" All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed.

" Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment.

" The acceptance of deeds of minors and incompetents by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein."

And in the Act of June 30, 1902 (32 Stat. L. 500), it is provided in section 16:

" Lands allotted to citizens shall not in any manner whatever or at any time be encumbered,

taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

The allotment of the lands in the Creek Nation to the enrolled members of the tribe entitled thereto was made in pursuance of these Acts of Congress. The patent issued to Sarah Smith covering the land which was sought to be taxed by the County of Okmulgee, refers to the provisions of these acts and contains the covenant of non-taxability as to this land for a period of twenty-one years.

The land in controversy was allotted under the statutes quoted. Subsequently in view of the erection of the State of Oklahoma, a reversal of policy was determined on, and without the consent of the members of the tribe who had agreed to the allotment of their land upon the condition above set forth Congress by formal enactment undertook to revoke

the tax exemption in certain cases. In section 19 of the Act of April 26th, 1906 (34 Stat. L. 137), it is provided:

> "*Provided further*, that all lands upon which restrictions are removed shall be subject to taxation and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

In the Act of May 27, 1908 (35 Stat. L. 312), it is provided in section 4, that

> "All land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

The question as to whether or not the latter acts made taxable the homestead allotments exempted from taxation by the laws quoted and the terms of the grant was before this court in the case of *English* v. *Richardson* (224 U. S. 680, 56 L. ed. 947) and the same question was before the court involving the Choctaw and Chickasaw agreements, in the case of *Choate* v. *Trapp* (224 U. S. 671, 56 L. ed. 941). In these cases this court held that the exemption from taxation was a property right offered to the Indian as a consideration for which he should, by its acceptance, surrender his right to the other tribal land

and consent to its division in severalty among the enrolled members of the tribe and those entitled thereto.

In the case of *Choate* v. *Trapp* (224 U. S. 671) the court says:

> " The individual Indian had no title or enforcible right in the tribal property. But as one of those entitled to occupy the land he did have an equitable interest which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled. *And though it provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim to the other property of the tribe formerly held for their common use. For the Atoka Agreement, after declaring that 'all lands allotted should be non-taxable,' stipulated further that each enrolled member of the tribe should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement, and to relinquish all of his right in the property formerly held in common.*
>
> " There was here, then, an offer of non-taxable land. Acceptance by the party to whom the offer was made, with the consequent relinquishment of all claims to other lands, furnished a part of the consideration, if, indeed, any was needed, in such a case, to support either the grant

or the exemption. *Wisconsin & M. R. Co.* v. *Powers,* 191 U. S. 386; *Home of the Friendless* v. *Rouse,* 8 Wall. 437; *Tomlinson* v. *Jessup,* 15 Wall. 458. *Upon delivery of the patent the agreement was executed,* and the Indian was thereby vested with all the right conveyed by the patent, *and like a grantee in a deed poll, or a person accepting a conveyance, bound by its terms, although it was not actually signed by him. Keller* v. *Ashford,* 133 U. S. 621; *Hendrick* v. *Lindsay,* 93 U. S. 143.

" *As the plaintiffs were offered the allotment on the conditions proposed; as they accepted the terms, and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were.*

" On the part of the state it is argued that there was, in fact, no tax exemption, but that that provision was only intended to guard absolutely against the alienation of the land whether for taxes, or at judicial sale, or by private contract. In other words, it is said that the tax exemption was only an additional prohibition against the sale, so that when the restrictions against alienation were removed by the Act of 1908 (35 Stat. at L. 312, chap. 199) the provision as to the non-taxability went as a necessary part thereof. * * *

" *The right to remove the restrictions was in pursuance of the power under which Congress could legislate as to the status of the ward and*

lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right which Congress undoubtedly had the right to grant. That right fully rested in the Indians and was binding upon Oklahoma."

The case of *English* v. *Richardson* involving the construction of the Creek treaty as to the taxation of Creek homesteads follows the opinion in the case of *Choate* v. *Trapp.*

This court having held that even though the restrictions were removed, the land was non-taxable as long as it remained the property of the individual allottee of the Five Civilized Tribes, the only question now for determination is:

Does the exemption from taxation written in the deed run with the land for a period of twenty-one years from the date of the deed so as to make the property exempt in the hands of a purchaser from the original allottee?

The language of the Act of May 27, 1908, provides that all lands from which restrictions have been removed shall be subject to taxation and all other civil burdens, the same as if it were the property of other persons than the allottee of the Five Civilized Tribes. This court having decided that this language

did not make the lands subject to taxation for the reason that the Congress of the United States could not take from the individual Indian a property right granted him, then does it not necessarily follow that this property right is the subject of sale by the Indian the same as any other incident or increment to his land which increases its value and that therefore the exemption inheres in and follows the land in the hand of the Indian's vendee?

In the case of *Williams* v. *Johnson*, 239 U. S. 414, 421, this court, in discussing the opinion of *Choate* v. *Trapp* and the power of Congress, says:

> " It is conceded by plaintiffs in error that an Act of Congress can supersede a prior treaty, but they insist that it is well settled 'that Congress is without power to change a contract or agreement for a valuable consideration with an individual Indian allottee.' *Choate* v. *Trapp*, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565, and *Jones* v. *Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, are cited, and incidentally *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578, and *Mullen* v. *United States*, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494.
>
> " The cases do not apply. It has often been decided that the Indians are wards of the nation, and that Congress has plenary control over tribal relations and property, and that this power continues after the Indians are made citizens,

and may be exercised as to restrictions upon alienation. *Marchie Tiger* v. *Western Invest. Co., supra.* Against this ruling *Choate* v. *Trapp* does not militate. In the latter case it was decided that taxation could not be imposed upon allotted land a patent to which was issued under an Act of Congress containing a provision 'that the land should be non-taxable' for a limited time; and excluding the application of the *Marchie Tiger* case, it was said that exemption from taxation 'and non-alienability were two separate and distinct objects.' And further, 'One conveyed a right and the other imposed a limitation.' The power to do the latter was declared, and it was said 'the right to remove the restriction (limitation upon alienation) was in pursuance of the power under which Congress could legislate as to the status of the ward, and lengthen or shorten the period of disability. *But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma'.*"

The Acts of Congress mentioned in the homestead deed involved in this case are a part of the contract between the individual allottee and the Creek Nation and United States as if they had been set out in full in the homestead deed. The exemption was, as this court has said, a property right which became vested in the individual allottee upon his acceptance

of the homestead patent containing this provision, and as such vested property right was binding upon the State of Oklahoma.

The exemption from taxation being a property right fully vested in the individual allottee, the provision that the land should be non-taxable for a period of twenty-one years from its date, being written in the deed, a person who purchased from the allottee, after the removal of his restrictions, would succeed to all of the property rights theretofore vested in the Indian. The distinction between the removal of restrictions and the property right created by the exemption from taxation as Justice McKenna so ably set forth in the case of *Williams* v. *Johnson*, *supra*, is, in our opinion, sufficient to determine this question.

These conditions were agreed to by the State of Oklahoma, which cannot now be heard to object to them.

It is insisted, however, by the state that it is a deprivation of some of the rights of the State of Oklahoma for Congress to exempt this land from taxation, and that it is incompatible with the rights of the state to permit any part of the land to remain free from taxation. This same contention was unsuccess-

fully made by the state in the case of *Choate* v. *Trapp* and *English* v. *Richardson*. The Acts of Congress, under which the lands were allotted in severalty to the members of the Creek Tribe of Indians, were all enacted long prior to statehood. It is provided in the Enabling Act (34 Stat. L. 267) under which the State of Oklahoma was created, that

> " Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

By the terms of this provision the State of Oklahoma agreed to recognize the rights of person or property pertaining to the Indians of said Territories in that in their constitution nothing should be written

or construed to limit or impair the rights of such Indians.

It is further provided in the Harris-Day Code of the State of Oklahoma, section 7303 as follows:

> " The following property shall be exempted from taxation: * * * *Eighth.* Such property as may be exempted by reason of treaties, stipulations existing between the Indians and the United States Government or by federal laws during the force and effect of such treaty or federal law."

The state must perforce, since the decision of this court in the cases of *Choate* v. *Trapp* and *English* v. *Richardson,* refrain from taxing these homestead allotments as long as they are in the hands of the original allottee. By accepting the provisions of the Enabling Act the state agreed that in its constitution they would not impair or limit the rights of the person or property of the individual members of the Creek Nation or Tribe of Indians. (See section 1 of Enabling Act, *supra.)* The right to tax the lands allotted as homesteads to the individual members of the Creek Tribe after conveyances by the allottee would violate the provision of the Enabling Act; for the state agreed not to limit or impair the property right of the Indian.

The tax exemption is a valuable property right, and hence is the subject of sale and transfer.

This property right extending as it does for a limited period of years is of value not only to the Indian but is likewise an element of value in his sale or disposition of his homestead forty acres provided for in the Creek Agreements. The fact that the purchaser of a homestead forty should not be required to pay taxes upon it for a period of twenty-one years from the date of the patent greatly enhances its value. This exemption is a property right in the hands of the purchaser which he acquires along with the other property conveyed to him by the deed from the allottee.

The leading case upon this point is *New Jersey* v. *Wilson*, 7 Cranch. 164. The principles of law announced by this court in that case have been reiterated and affirmed by the Supreme Court in many subsequent decisions, and they sustain the contentions we make here. The court there said that the tax exemption,

> "though for the benefit of the Indians, is *annexed*, by the terms which create it, *to the land itself, not to their persons.* It is for their advantage that it should be annexed to the land, *because in the event of a sale*, on which alone the question could become material, *the value would be enhanced by it.*"

Upon that authority we are entitled to a reversal of the decision of the Supreme Court of Oklahoma.

In *State* v. *Wilson*, 2 N. J. Law (1 Pennington) 282, wherein the Supreme Court of New Jersey decided the case, the facts are stated:

> "The land remained in the possession of this tribe of Indians until the year 1801, when they having an invitation to move into the State of New York, and join a tribe of Indians there, applied to the Legislature for leave to sell the land, on which application, the Legislature passed a law appointing commissioners to sell the land and apply the purchase money to the use of the Indians. This being done and the land being purchased by twenty-two different persons in divided parts the assessor of the township considering that by this sale the exemption in the Act of 1758 was done away, accordingly assessed for county and state charges the land, the same as any other land of equal value, under the general law for raising money by tax, on which the purchasers brought a *certiorari* and removed the assessment to this court when the court in September Term 1804, three justices out of four then on the bench agreeing, quashed the assessment. In December 1804, the Legislature passed a law, repealing the seventh section of the Colonial Act of 1758, after which, the assessor of the township again assessed the proprietors of the land."

The State Supreme Court of New Jersey held that the Legislature had the right to repeal the provision of the Act of the Colonial Legislature of 1758 exempting the land from taxation.

Under the Act of 1758 certain commissioners named in the act purchased the lands in controversy for the Indians and agreeably to the directions of that act, the deed was made to those commissioners and their heirs in trust for the use of said Indians and by special provision the Indians were prohibited from leasing or selling any part of their lands which by section 7 were to be thereafter exempt from taxation.

The opinion of the State Court of New Jersey was based on the principle that:

> " The fee to the land was not in the Indians. The purchaser cannot claim title from or under them. The Commissioners were not authorized to sell the interests or rights of the Indians, but to sell the land. The fee of this land was in certain trustees, who were the agents of the state. The fact is, the land was in the custody of the state, for the benefit of the Indians; and at their request the state ordered it sold, and appropriated the purchase money for their advantage and benefit. * * * If the Legislature had the right to sell the land, it had also, as incident to that, a power to take off the other provisions

and restrictions connected with it. I am of opinion that the repealing law of 1801, is not only constitutional but wise and proper. The exemption from taxation while the land was in the possession, use and occupation of the Indians, who were from their habits incapable of paying taxes, was benevolent and prudent, but to carry this exemption to citizens of a commonwealth, would be unequal, odious, and unjust. To say that the purchasers paid more for the land than they otherwise would have done, under an expectation that they were to be perpetually exempt from a land tax, is paying no compliment to the understanding of the yeomanry of Burlington County. If, however, they entertained such a mistaken notion, it is time they were put right."

In *Trask* v. *Maguire,* 18 Wall. 391, 85 U. S. 938, the St. Louis and Iron Mountain Railroad Company claimed the exemption from taxation enjoyed by the original company. In that case by an Act of the Legislature of the State of Missouri creating the original company, it was provided that the property of said company should be exempt from taxation. The state loaned some of its bonds to the railroad company and in default of the payment of the interest the road and all its rights were bought by the state, and subsequently sold to the grantors of the second company. The sale by the state was of "the road and its appurtenances and all the franchises." The act under which the sale was made provided that the purchas-

ers of the road should have all the rights, franchises, privileges and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the *conditions*, limitations and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company originally possessed, if it were competent for the legislature at the time under the new constitution, to confer this privilege. The court in this case holds that the tax exemption ceased when the property was purchased and the state acquired title, *i. e.:*

> " When the state became the purchaser the immunity ceased; the property stood in its hands precisely the same as any other unincumbered property of the state, exempt from taxation, not by virtue of any previous stipulation with the company, but as all property is thus exempt."

In *Tucker* v. *Ferguson*, 22 Wall. 527, 22 L. ed. 805, it was said:

> " Forbearance to tax was a bounty voluntarily given by the state. Forbearance for a time doubtless increased, to some extent, the value of the lands. Never to tax would have increased their value still more. *N. J.* v. *Wilson*, 7 Cranch. 164. There is no foundation for the claim for one more than for the other. The state

in the act accepting the grant, agreed, *sua sponte*, to forbear to tax for seven years."

This court has made it clear that the tax exemption was not a mere personal right; that the exemption was a property right granted to and vesting in the allottee, of equal dignity with the remainder of the grant.

In *Choate* v. *Trapp, supra,* this court said:

"The patent issued in pursuance of those statutes gave the Indian *as good a title to the exemption* as it did to the land itself."

"Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption *than of any other right* in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land. * * * "

The court made it clear that the tax exemption was a property right of value appurtenant to the land which enhanced its value. In the Creek Nation the land with the tax exemption is more valuable than without because it will bring more money in the market.

If then, as the court says, the Indian had "as good title to the exemption as to the land itself" it was subject to transfer as a property right; other-

wise it was not "as good title as he had in the land itself." The illustration used by the court makes our point. If the statute had undertaken to reduce his fee to a life estate or diminish the area of his allotment it would have invaded the rights granted by Congress. To say that the tax exemption which vested in the land for a definite period of time by the act and mutual undertakings which created the title, may be taken away upon any contingency whatever before the termination of the period fixed in the grant, is to admit that the same authority might change his fee simple title to a life estate, or to an estate to be enjoyed only so long as he holds the land. If the argument of counsel is sound, that tax exemption ceased with the transfer of the title, then it would be legal to deny to his vendee any other incident of the grant he received in his patent, as covenants of warranty, or of possession, etc., on the ground that these incidents were only intended for the protection and benefit of the Indian allottee while he held the land and that the reason ceased when he sold the land; in other words that the title and all its incidents were personal to the allottee and did not run with the land. But we know that this cannot be so under the terms of the grant, and as this court has said that the title to the exemption is as good as the title to the land itself, a sale by the allottee of the land carries all the incidents of that title that he held.

The title to the land was absolute and when the restrictions against sale were removed, the allottee had unlimited power to sell his land as a freehold estate. If his title to the exemption is equally good then he had the same power to convey it as a thing of value appertaining to his land.

This court said further:

> " The provision that 'all land shall be non-taxable' naturally indicates that *the exemption is attached to the land—only an artificial rule can make it a personal privilege.* But if there is any conflict between the natural meaning and the technical construction—*if there were room for doubt,* or if there were any question as to *whether this was a personal privilege* and repealable, or an *incident attached to the land itself* by a limited period, that doubt, under *this rule, must be resolved in favor of the patentee.*"

The court said also that the strict rule that in general governs the construction of tax exemptions does not obtain here:

> " But in the government's dealings with the Indians the rule is exactly the contrary. The construction instead of being strict, is liberal; *doubtful expressions,* instead of being resolved in favor of the United States, *are to be resolved in favor of a weak and defenseless people,* who are wards of the nation and dependent wholly upon its protection and good faith." (Italics are ours.)

The decision in this case will determine not only whether the purchasers of the land in controversy acquired with it an exemption from taxation, but it will decide whether the members of the Creek tribe desiring to sell lands that are exempt from taxation in their hands, may go into the market and offer such lands for sale at their intrinsic value with the added value of the exemption from taxation for the remainder of the 21-year period. If there were any doubt about the exemption attaching to the land, which we do not perceive, in this view of the matter the doubt should be solved in favor of the Indians.

The exemption here is for only a limited time, is based upon contract and is not subject to the objection that a perpetual exemption is inconsistent with our form of government, a distinction that has many times been noted by the courts, which have held that in the latter case the matter is always subject to the control of the legislature.

In 1855 the Circuit Court of Appeals for the Sixth Circuit decided the case of *Thompson* v. *Holton,* 13,958, 23 Fed. cases, page 1049, involving the right of the State of Indiana to tax land patented and sold with an exemption against taxation for five years. The court said:

> " As in the case before us, by this law, the state agreed not to tax land purchased of Con-

gress within the state, for five years after the purchase. Here is a stipulation, as express as words could make it, to all purchasers; and every purchaser accepts the proposition by making the purchase. H e r e is a contract as express as words can make it. * * *

" It is argued that if the land in question be exempted from taxation, on the same principle, the land purchased by revolutionary soldiers in the state would forever be exempted from taxes. The law, at present, exempts the lands of revolutionary soldiers from taxation, consequently a purchase by such soldiers of land in Indiana would make the exemption perpetual. Now this case has no analogy whatever to the one under consideration. The exemption in the one case is for the term of five years, in the other it is for the present, not for any specific time or for all time to come, but merely from present taxation. In the one case, it is a matter for the exercise of the discretion of the Legislature, in the other no such discretion can be exercised, as the exemption is for five years. In the one case there is a specific contract, in the other there is no contract; and no obligation to extend the exemption beyond the present time; the next year the law may be repealed, and there is no ground of complaint; but in the other a repeal of the exemption before the termination of five years, would impair the obligation of the contract."

The court will observe in this case some features very analogous indeed to those presented in the case

at bar. The exemption in the Indiana case was based upon an Act of Congress, which authorized the people of Indiana Territory to form a constitution and be admitted into the Union; in other words, the Enabling Act of Indiana. The people of the territory were required, as usual in such matters, and as the people of Oklahoma, to accept the conditions imposed by Congress. In the ordinance adopted by them, accepting the terms of admission, they adopted and ratified the provision of the Act of Congress exempting from taxation all public lands sold for a period of five years from the date of sale. In the case at bar, the Government entered into agreements with the Indian tribe. Acts of Congress embodying these agreements were passed, and rights became fixed thereunder by the full performance of the agreements on the part of the Government and the Indians. After this was all done, Congress in 1908 as it did in 1847, as to Indiana lands, passed an act by which such lands might be subjected to taxation by the authorities of the state. This was done, however, subsequent to the 16th day of November, 1907, when the people of Oklahoma, by section 270 of their constitution, ratified and confirmed all existing rights of the Indians under treaty with the Government. Upon the principles announced in the decision above neither the Act of Congress of 1908 nor any act of the State of Oklahoma could affect in any manner these

exemption rights, which had become vested and fixed under the said agreements and legislation.

The principles of law announced in *New Jersey* v. *Wilson*, 7 Cranch. 164, above, have been reiterated and affirmed by the Supreme Court in many subsequent decisions. The property right is an exemption from taxation, the contractual character of such a law, within the constitutional meaning, and the inviolability of such a right have all been considered in many decisions; and the right, under whatever circumstances it may have arisen, has at all times been held inviolate.

There are instances almost innumerable, and we refer to some of them, in which the courts have held that a grant of a franchise to a corporation with the exemption of its property from taxation for a limited term, if accepted and acted upon by the corporation, constitutes a contract between the corporation and the state or municipality granting the same, and that the rights of the parties thereto c a n n o t be changed or modified by legislation. The rule has been exactly the same in cases where exemptions have been granted to churches, charities, public or private enterprises, and contracts of this character are of equal efficacy whether between states or municipalities and individuals or between two states.

In support of the rule here stated we refer the court to the following authorities, all of which refer with approval to the controlling principle of the New Jersey case:

Terrett v. *Taylor*,
9 Cranch. 43;

United States v. *Arredondo and others*,
6 Peters 738;

Armstrong et al. v. *The Treasurer of Athens Co.*,
16 Peters 289;

Baldwin et al. v. *Payne et al.*,
6 Howard 332;

The West River Bridge Company v. *Dix et al.*,
6 Howard 542;

State Bank of Ohio v. *Knoop*,
16 Howard 385 and 401;

Von Hoffman v. *City of Quincy*,
4 Wallace 550-4;

Home of the Friendless v. *Rouse*,
8 Wallace 438;

Salt Company v. *East Saginaw*,
13 Wallace 376;

Tomlinson v. *Jessup*,
15 Wallace 458;

Humphrey v. *Pegues*,
16 Wall. 244;

Morgan v. *Louisiana*,
93 U. S. 223;

Antoni v. *Greenhow*,
197 U. S. 803;
Louisiana v. *Jumel*,
107 U. S. 750;
Givens v. *Wright*,
117 U. S. 555;
Pearsall v. *Great Northern Railway*,
161 U. S. 662;
Jefferson Branch Bank v. *Skelly*,
1 Black 436;
Great Northern Ry. Co. v. *Minnesota*,
216 U. S. 206, l. c. 233.

In referring to the principle as announced in the New Jersey and other cases by the Supreme Court along the same line, it is said in the 4th Wallace, 550 above, that:

> "The principles which they maintain are now axiomatic in America jurisprudence, and are no longer open to controversy."

In the *Home of the Friendless* v. *Rouse*, 8 Wall. l. c. 438, above, the following language is used:

> " The validity of this contract is questioned at the bar on the ground that the legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of

this court, that a state may, by contract based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the state if the charter containing it is accepted." (Citing numerous authorities.)

In *Terrett* v. *Taylor*, 9 Cranch. 43, the court speaking through Mr. Justice STORY, relative to rights in property acquired under the laws of Virginia, say:

> " If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

Nor is this an old and abandoned doctrine. The principles are as vital today as when first announced by the Supreme Court. In *Great Northern Ry.* v. *Minnesota*, 216 U. S. l. c. 233, above, speaking through

Mr. Justice HARLAN, the court in approval of a former and earlier announcement of the court say:

> "A distinction must not be overlooked when considering the assignability of a tax exemption between those imposing a commuted system in lieu of property taxes, and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land, granted to a railroad company to aid in the construction of a railroad is specifically exempted from taxation until sold by the company, and the company accepts, in consideration of the exemption, the exemption attaches to and follows the land. *New Jersey* v. *Wilson*, 7 Cranch. 164; *State* v. *Hicks*, 30 Am. Dec. 423; *Ry. Co.* v. *State*, 75 Tex. 356. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it. In the *Stearns* case the court determined only the question whether the lands of the railroad company were taxable. It held, upon the showing there made, that there was a valid contract with the railroad companies in respect to the taxation of the lands there in question which it was beyond the power of the state to impair by legislation."

Thus it will be seen, that from the earliest decisions of our Supreme Court to the latest decisions

of that court and permeating all judicial utterances on the subject will be found a rigid adherence to that principle that vested property rights shall be protected by the courts against hostile legislation; that principle has become fundamental in our jurisprudence.

This court has frequently considered the question whether upon the consolidation of railroad companies, property brought into the new organization carried with it tax exemption that had formerly attached to it.

In the case of *Tennessee* v. *Whitworth*, 117 U. S. 139, 29 L. ed. 833, the court said:

> " It only remains to consider whether the Nashville and Decatur Company is entitled to the same exemption. When two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it was created. *Tomlinson* v. *Branch*, 15 Wall. 460 (82 U. S. bk. 21, L. ed. 189); *Branch* v. *Charleston*, 92 U. S. 682 (bk 23 L. ed. 752); *County of Scotland* v. *Thomas*, 94 U. S. 690, and *Maine Cent. R. R. Co.* v. *Maine*, 96 U. S. 512 (bk. 24 L. ed. 836-841); *Greene County* v. *Corness*, 109 U. S. 104 (bk. 27 L. ed. 872). From this it follows that as the

capital stock of both the original Tennessee corporations was exempt from taxation, the capital stock of the united or consolidated company formed by the simple aggregation of that of the two old ones, is also exempt, unless it has been provided to the contrary."

To the same effect is *Humphrey* v. *Pegues*, 16 Wall. 244. In the case of *International & Great Northern Ry. Co.* v. *State*, 75 Tex. 356, 12 S. W. page 685, the court had under consideration a similar question. The court said:

"Looking to the provisions of the Act of March 10, 1875, we think there can be no doubt that the exemption from taxation given by it, instead of being a right vesting only in appellant, *is a right which inheres in the property to which it applies, and follows it into the hands of whomsoever may become its owner.* The exemption is not given to a company named alone, but to its assigns and successors as well; thus evidencing an intention that the exemption from taxation should adhere to the property exempted, and follow it into the hands of whomsoever may become its owner. * * *

"The act in question, and its acceptance by the company, constitutes, as declared by the legislature, 'an irrepealable contract and agreement between the state and the said company, its successors and assigns,' based on consideration deemed by the legislature sufficient; and, under

it, the right to exemption would continue, in favor of persons or corporations who may become the owners of the property to which the exemption applies, even though the appellant corporation should be dissolved by a decree declaring the forfeiture of its charter. The existence of this right enhances the value of the property to which it applies. Shareholders and creditors must be presumed to have dealt with the corporation on the faith of the contract which gave the exemption, and it cannot be taken away by legislation, by dissolution of the corporation, or in any other manner not sufficient to pass title to any other property from one person to another. The right to exemption from taxation is secured by the same guaranty which secures title to those owning lands granted under the act, and, though the corporation may be dissolved, will continue to exist in favor of persons owning the property to which the immunity applies. Lawful dissolution of a corporation will destroy all its corporate franchises or privileges vested by the act of incorporation; but, if it holds rights, privileges and franchises having the nature of property, secured by contract based on valuable consideration, these will survive the dissolution of the corporation, for the benefit of those who may have right to or just claim upon its assets."

Counsel for defendant in error say that tax exemption was a personal right thrown about the allottee for his needed protection; that he was in a class apart from the white man, and as such was the

peculiar subject of this protective legislation of Congress. It was argued in the *Choate-Trapp* case that tax exemption and restriction against alienation ran together and that when the reason ceased as to one it also ceased as to the other. But the court said that was not true. If the removal of restrictions placed him in the same class with white people with reference to the limitations to be imposed on him he stood upon the same plane with reference to all the incidents of title conveyed by grant to him. And one of the incidents of a white man's title is the power to convey the whole estate held by him unless there are words of limitation in his grant, limiting to a personal or other use any part of the estate granted to him.

This court has said that the restriction against alienation and tax exemption "were separate and distinct subjects. One conferred a right and the other imposed a limitation." As the one did not depend on the other we are not to inquire why Congress granted this exemption further than that it was part of the grant based upon a valuable consideration as this court has found. The exemption inhered in the title to the land; it ran with the land regardless of the fact that the Indian had been determined by Congress capable of making a voluntary conveyance of his land. It was exactly the same as if originally Congress had made the grant with tax exemption for

21 years and no restrictions against alienation; as if the Indian had exactly the same status as a white man regarding his title and power to convey. And as in the case of a white man, his tax exemption, to which the court has said he had title as a property right, was the subject of conveyance as an incident to the title to his land.

In the *United States* v. *Quincy*, 71 U. S. 535-555, 18 L. ed. 403, in discussing the provision of article 1 of section 10 of the constitution that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts;" after enumerating various acts which have been held to impair the obligation of the contract the court says:

> " It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last mentioned not less than the first. Nothing can be more material than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the constitution against invasion. The obligation of the contract 'is the law which binds the parties to perform their agreement.' *Sturgis* v.

Crowningshield, 4 Wheat. 122. The prohibition has no reference to the degree of impairment. The largest and the least are alike forbidden. In *Green* v. *Biddle* 8 Wheat. 84, it was said:

> " 'The objection to the law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law affects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage.'
>
> " 'One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect on its obligation, dispensing with any part of its force.' *(Planters Bank* v. *Sharpe*, 6 How. 327.)"

Green v. *Biddle*, 8 Wheat. 1, 5 L. ed. 547, cited above, was an action brought by certain heirs of John Green, deceased, against the tenant Richard

Biddle to recover certain lands in his possession in the State of Kentucky and involved the construction of certain acts of the Legislature of Kentucky. The defendants claim that the acts of the Kentucky Legislature were unconstitutional as impairing the obligation of the compact between the States of Virginia and Kentucky contained in the Act of the Virginia Legislature of 18th of December, 1789, which declares that all private rights and interests of lands within the said district (of Kentucky) derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state.

This compact was ratified by the convention which framed the Constitution of Kentucky and incorporated into that constitution as one of its fundamental articles.

The validity of the compact was assailed by the defendant Biddle and the court held that the act was valid and binding upon Kentucky and that any attempt by the Legislature to in any way reduce or impair the rights accorded under the compact would be unconstitutional and void as impairing the obligation of the contract.

The case of *Caverly-Gould Co.* v. *Village of Springfield,* 83 Vt. 39, is in point.

The Village of Springfield had voted "to exempt from taxation for a period of ten years all manufacturing establishments investing a capital of over $5000.00 which may be established and and put in operation within the next twelve months." The Caverly-Gould Co. accepted this proposition and erected a plant at a cost of $50,000.00 and operated same for a period of four years. It then ceased doing business and leased its plant to another concern, which would not have been entitled to take advantage of the offer of exemption from taxation, owing to the character of its business, at the time the plant was erected. The Village then attempted to levy and collect a tax claiming the property had lost the character which under the contract made it exempt, when the Caverly-Gould Co. ceased to operate it. The Supreme Court of Vermont held against the Village and sustained the exemption as being based on a contract and having sufficient consideration to support it.

Upon these decisions we maintain that the exemption from taxation provided for by the Acts of Congress of March 1, 1901 (31 Stat. 861), and June 30, 1902 (32 Stat. L. 500), incorporated in the deed, and the tax exemption of twenty-one years written in the deed itself, became and was a vested property right attached to and a part of the land, enhances the value thereof in the hands of the individual al-

lottee and passing when he conveys the land to his grantee. That this vested property right could not be taken from the allottee by Act of Congress without impairment of the rights guaranteed to all citizens of the United States by the constitution. That the Enabling Act providing, as it does, that the State of Oklahoma when created should respect all rights and privileges of all Indians and the provision of the Harris-Day Code of Oklahoma exempting from taxation all lands exempted by any Act of Congress or law of the United States is a plain and clear acceptance by the state (if any acceptance was necessary) of the terms upon which that deed was offered and the state cannot assert any right or claim which is paramount to the exemption from taxation for a period prescribed in the Act of Congress and written in the deed itself.

We, therefore, respectfully submit that the opinion of the Supreme Court of the State of Oklahoma should be overruled and the case reversed.

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In the Supreme Court of the United States

October Term, 1916

Cornelia Sweet, J. A. Price *et al.*,
Plaintiffs in Error,
vs.
Elmer E. Schock, as Treasurer, Etc.,
Defendants in Error.

No. 52

In Error to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma

BRIEF FOR DEFENDANTS IN ERROR

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In the Supreme Court of the United States

October Term, 1916

Cornelia Sweet, J. A. Price *et al.*,
Plaintiffs in Error,
vs.
Elmer E. Schock, as Treasurer, Etc.,
Defendants in Error.

No. 299

BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF THE CASE

It is not deemed necessary nor desirable to enter into a detailed statement of the case. The brief filed herein by the plaintiffs in error contains a complete history of the litigation in this case and any further statement would be mere repetition. We will therefore proceed to a discussion of the case and argument.

I.

The only question in this case is whether or not land belonging to the homestead allotment of Sarah Smith, a Creek freedman, and non-taxable under the Creek Treaties for twenty-one years, if retained by the allottee, is exempt from taxation in the hands of plaintiffs in error.

In discussing this proposition, we think the first thing to be considered is what object Congress had in view when the various tax-exempting provisions were placed in the treaties with the Creek Indians. Did Congress, as a matter of fact, intend that the exemption should become a privilege attached to the land, or did the exemption by Act of Congress become a privilege and protection to the Creek Indians and freedmen? Was this exemption by Congress intended to conserve the estate of the Indian and freedman, or was it intended to allow the lands allotted to the Indian and freedman to escape taxation in the hands of the grantee?

The Act of March 1, 1901 (30 Stat. L. 861), provides:

> "Each citizen shall select from his allotment forty acres of land as his homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed conditioned as above.
>
> "Immediately after the ratification of this agreement by Congress and the Tribe * * * the principal chief shall deliver * * * a

deed conveying to him all right, title and interest of the Creek Nation in * * * the lands embraced in his allotment certificate."

The Act of June 30, 1902 (32 Stat. L. 500, c. 1323), provides:

"16. Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable and free of any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead in which this condition shall appear."

Then comes the Act of Congress of March 3, 1903 (32 Stat. L. 996), which provides:

"And provided further, that nothing herein contained shall prevent the survey and platting at their own expense of townsites by private parties where stations are located along the lines of railroad, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

And afterwards, the Act of April 26, 1906, Section 19 of which is as follows:

> "That all lands upon which restrictions are removed shall be subject to taxation and other lands shall be exempt from taxation as long as the title remains in the allottee."

From the foregoing it is apparent that it was the intention of Congress to exempt the property of the Creek Indians and Freedmen from taxation only so long as it was owned by the allottee. There was never a desire on the part of Congress to make this land non-taxable in the hands of a vendee. It is well to remember that under the Act of March 3, 1903, *supra*, the allottee had the right to set apart any portion of his allotment for townsite purposes, and under the Act of Congress of April 26, 1906, Congress expressed the clear intention that when this was done the land became taxable.

Now, under these conditions the restrictions were removed from the land of Sarah Smith, a Creek Freedman, upon the petition and application of Sarah Smith, the allottee, and under the same conditions Nathan D. Boyd bought a part of the homestead allotment of Sarah Smith, and had it platted and sold for townsite purposes. On July 26, 1908, after the Act of May 27, 1908, removing restrictions on this land, Sarah Smith had the

balance of her homestead allotment surveyed and platted and sold for townsite purposes. At the time these lots were conveyed the purchasers of said lots well knew that Congress had said in the Act of April 26, 1906, and the Act of May 27, 1908, that the land in question should become taxable when conveyed. The very use to which they intended to put the land is inconsistent with exemption from taxation. The deed to Sarah Smith was issued April 23, 1904, and the restrictions upon her homestead were removed upon her application on February 1, 1907, and at a time when Congress had declared by the Act of April 26, 1906, that when restrictions were removed, the land should become taxable. She sold only a part of her homestead on February 28, 1907, to Nathan D. Boyd, but had platted and sold the balance of her homestead after the Act of May 27, 1908, was passed, which reads as follows:

> "Sec. 4. * * * That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

The various enactments of Congress show clearly that the sole purpose of creating this tax

exemption, as well as all exemptions from levy and sale, was for the purpose of protecting the Indian or Freedman. It is our contention that it was a personal exemption granted the Indian for his protection and did not run with the land; that it was such a personal privilege that would not descend to the purchaser of the land. There is only one thing that would make this exemption descend to the purchaser, and that would be the clear intention of Congress to make it do so. Cases sustaining this position are as follows:

Rochester Railroad Co. v. *Rochester*, 205 U. S. 236.
Home Ins. Co. v. *Tenn.*, 161 U. S. 200.
Phoenix F. & M. Ins. Co. v. *Tenn.*, 161 U. S. 174.
Mercantile Bank v. *Tenn.*, 161 U. S. 161.
Picard v. *East Tenn. R. Co.*, 130 U. S. 637.
Chicago, Etc., R. Co. v. *Mo.*, 122 U. S. 561.
Chesapeake, Etc., R. Co. v. *Miller*, 114 U. S. 176.
Memphis, Etc., R. Co. v. *Berry*, 112 U. S. 609.
Louisville, Etc., R. Co. v. *Palmes*, 107 U. S. 244.
Morgan v. *La.*, 93 U. S. 217.
Armstrong v. *Athens Co.*, 16 Peters 281.

This same question has been before the courts of the country on numerous occasions, that is, whether lands, which for any reason are exempt from taxation in the possession of any person, become taxable when sold.

Peck v. *Comm.*, 4 Dill, 370 Fed. Case 10891.

Com. of Miami Co. v. *Breckinridge*, 12 Kan. 96.

Revoir v. *State*, 36 N. E. 1109.

Armstrong v. *Athens. Co. Treas.*, 16 Peters 281.

Town of New Haven v. *Sheffield*, 30 Conn. 160.

Brainard v. *Town of Colchester*, 31 Conn. 407.

Judge Brewer, in the above case of *Commissioners of Miami County* v. *Breckinridge*, very ably discusses this question of tax exemption as follows:

> "The Constitution of the United States gives to Congress the power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States. But under this provision of the Constitution Congress would have no power to dispose of the public lands in such a way that they would be exempt from State taxation after the Government had disposed of them to individuals and had parted with all control over them.
>
> * * * * *

> "We claim then that the Federal Government under the Constitution of the United States, has no power to dispose of public lands or to assent to the disposal of them to individuals in fee simple, in such a way as to deprive the State of the exercise of its sovereign right to tax them. So long as the lands remain Indian lands or so long as the Government retains an interest or control over them, the State, by compact in the act of admission, is prohibited from exercising the taxing power in relation to them. But the moment the title passes out of the Government, and is vested in individuals, the lands become subject to all the laws of the jurisdiction where they are located."

He went further and discussed the case of *State* v. *Wilson*, 7 Cranch. 164, the leading authority relied upon by plaintiffs in error in this case, to escape from their just burdens of taxation. He said—and we think that is the law of the land— with reference to that case:

> "Thus there was an express contract by the State that the lands should not thereafter be taxable, a grant of certain nontaxable lands in purchase of other property. The exemption increased the value of the consideration, was a part of the consideration. Here the State is no party to the contract, that was *inter alios partes*, neither does the exemption appear as a part of the consideration."

We have no clearer exposition of the law with reference to that question than that of Judge

Brewer in the above case. However, all of the cases we have examined show clearly that this exemption from taxation, like the exemption from levy and sale, and the restrictions against the sale of lands, were personal exemptions given the Indian for his protection; to prevent his becoming the victim of unscrupulous persons; to keep him from coming to want and becoming a burden upon the community. What further interest did our Government have in the matter? Could it have been the intention of the Government to exempt other citizens from their just liabilities? We think not. The purchasers of this Creek Freedman's land knew full well that Congress had declared this land to be taxable. How can they contend they are entitled to any standing in a court of equity?

As a matter of fact, we think that the very condition upon which the Indian was allowed and allotted his land was that the land was placed exactly as other land of the State and subject to the same burdens of taxation. If that be true, can these plaintiffs in error claim anything in this court? The State assuredly has the right to tax this land unless there is a direct and certain prohibitory statute. Where exists such a statute? The State cannot be deprived of its rights with-

out due process of law any more than could these plaintiffs in error.

The State, in its Constitution and Act irrevocable, did what? The State accepted and adopted all the protective provisions of the law enacted by Congress for the protection of the Indian, but never did waive its right to tax a large body of our land any longer than it was restricted. In all fairness, what standing are pliantiffs in error entitled to in a court of equity? They were not parties to the contract between this Government and the Indian, if contract it be, they cannot claim ignorance of the law, for they well knew that Congress in two Acts had declared the lands which they purchased to be taxable when in the hands of a grantee. They are mere interlopers, seeking to clothe themselves with the mantle of protection thrown around the citizens of the Creek Nation. It does not appear that they need this protection or are entitled to it.

Should it be conceded that Acts of Congress seeking to tax the land while it is owned by the Indian are violative of the Constitutional provision and void, so far as it affects the Indian or Freedman, it is based solely upon the ground that property rights cannot be destroyed by legislative

enactment. However, these plaintiffs in error had no property rights taken away from them by Acts of Congress making these lands taxable. They acquired this land in the face of laws making them taxable. This brings us to the discussion of the points sought to be made by plaintiffs in error, and the authorities cited by them.

II.

The construction placed upon the Acts of Congress and Treaties relating to the Creek Tribe of Indians, does not justify the contention of the plaintiffs in error that the tax exemption extends to them.

The plaintiffs in error cite three decisions of this court upon which to base their contention that the land they acquired through purchase of the homestead allotment of Sarah Smith is non-taxable:

State v. *Wilson*, 7 Cranch. 164 (U. S.)
Choate v. *Trapp*, 224 U. S. 671, 56 L. Ed. 941.
English v. *Richardson*, 224 U. S. 680, 56 L. Ed. 945.

In the case of *The State* v. *Wilson*, *supra*, Chief Justice Marshall rendered the opinion of the court, and held that where the State of New Jersey had entered into a solemn contract with the Delaware Tribe of Indians, which provided that

they should have certain lands which were to be non-taxable, and afterwards agreed that the State might convey the said lands without reserving to the State the right to tax the lands, but allowing the Delaware Indians to convey their possessions without anything being said about the tax exemption on said lands, it could not, after allowing the purchasers to acquire the lands of the Delawares, while so exempt from taxation, for the acquisition of valuable property rights, annul and destroy that exemption from taxation without notice to the said parties and against their consent. In other words, the purchasers having succeeded to all the rights of the Delaware Indians, under the contract with the State of New Jersey, their land could not be taxed by the State for the reason that that would be an impairment of the contract by legislative enactment. But he did say:

> "It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted upon. The land has been sold with the assent of the State with all its privileges and immunities. The purchaser succeeds with the assent of the State to all of the rights of the Indian. He stands with respect to the land in their place and claims the benefit of

their contract. This contract is certainly impaired by a law which would annul this essential part of it."

Chief Justice Marshall says in express terms that the State of New Jersey, as a condition to the promise given to the Delawares to sell their lands, might have named the terms upon which such promise was granted, but failed to do so. But Congress, in the Act of 1903 and the Act of 1906, and the Act of 1908, did name the terms upon which the Creek Indians and Freedmen might sell their homesteads. It is true that Congress passed these acts relative to the Creek homesteads without making the Creeks a party to the agreement, but there was no obligation or requirement placed upon the Indian to sell his land. That was an option given him by Congress. But if he accepted the privilege granted him by Congress he did so knowing that the land thereby would become subject to taxation. While it is true that Congress might grant the Indian the right to sell his land after the removal of restrictions thereon, it could not take away his twenty-one year exemption from taxation without the consent of the Indian, and so long as the Indian kept his land it would remain free from taxation,

but when he accepted the terms made by Congress, to-wit, the privilege of selling his land, he accepted also that part of the conditions that made his land taxable, and how far are these plaintiffs in error from having any rights invaded by Act of Congress? They are not even parties to the contract; they knew that the lands granted the Indian was restricted land, and that the privilege to sell was granted upon the condition that the land become taxable, and, yet, they seek to obtain the advantage of a provision made for the benefit of the Indians. They say on page 30 of their brief:

"Suppose the Legislature of the State of Oklahoma for certain reasons of public policy had, by valid enactment, said that certain specifically described lands in each township or state should not be taxed for a certain period of years, would it be contended that in order that the parties who owned this land at the time and after this enactment, in order that they might pass the right to the grantee, would have to insert this provision in the deed of conveyance? It would be hard to find anyone with the courage to argue such a provision."

We do not think the above is a fair example or that it applies to this case. In the first place, neither the State Legislature nor Congress has the power to exempt land from taxation except for a definite and express purpose, and when that pur-

pose and use for which the land is intended cease to exist, the taxing power of the State immediately comes into being in reference to the particular land in question. It has been held time and time again by this court that when the use to which land has been put, and for that reason exempted from taxation, has ceased to exist, that the right to tax the land is unquestionable.

The case of *Choate* v. *Trapp*, *supra*, is relied upon by plaintiffs in error, chiefly for the reason that it is a late case, and follows, to some extent at least, the case of *State* v. *Wilson*, *supra*. *Choate* v. *Trapp* was a case where the State of Oklahoma sought to tax the lands of the Choctaw and Chickasaw Indians, *while it remained in their possession*, after the same had been exempted from taxation while in the possession of the allottees for twenty-one years, and after Congress had declared that the same should become subject to taxation when the restrictions were removed. Mr. Justice Lamar stated the opinion of the court in this case, and his expression of the law of the case and his reasoning are so clear that no one can be left in doubt as to his reasons for so holding. The court holds in that case that the removal of restrictions by the Act of May 27, 1908, al-

though providing for the land to become taxable, when the law took effect, could not have the effect of making the land subject to taxation while the same was owned by the Indian for the reason that under the Atoka Agreement, the Indian, in consideration of the fact that he had given up all claims to other lands, should have certain lands which would be non-taxable while in his possession for twenty-one years. The court held that Congress could not, by acting arbitrarily and without the assent of the Indian, deprive him of a property right acquired by purchase and based upon a valuable consideration, without the consent of the Indian. The Act of Congress was a voluntary act and conferred a privilege upon the Indian, without any condition of any sort, and the Indian had the right to accept it without giving up anything; then Congress intended to arbitrarily subject the Indian lands to taxation. In other words, the right to tax the land was not made a condition to the removal of restrictions. Is there any doubt in the mind of anyone that Congress could have placed this condition upon the removal of restrictions? This the Indian could have accepted or rejected as he saw fit, but if he did accept the privilege with the condition

attached, he would have been bound by it, and the State of Oklahoma could have taxed his land while in his possession.

In the opinion of the case it is said:

"The individual Indian had no title or enforceable right in the tribal property. But as one of those entitled to occupy the land, he did have an equitable interest, which Congress recognized, and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim in the other property of the Tribe formerly held for their common use. For the Atoka Agreement, after declaring that 'all land, * * * allotted, should be non-taxable,' stipulated further that each enrolled member of the Tribes should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of the agreement, and to relinquish all of his right in the property held in common.

"There was here, then, an offer of non-taxable land. Acceptance by the party to whom the offer was made, with consequent relinquishment of all claim to other lands, furnished a part of the consideration, if, indeed, any was needed, in such a case, to support either the grant or the execution. *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 386, 48 L.

Ed. 231, 24 Sup. Ct. Rep. 107; *Home of the Friendless* v. *Rouse*, 8 Wall. 437, 19 L. Ed. 497; *Tomlinson* v. *Jessup*, 15 Wall. 458, 21 L. Ed. 205. Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him. *Keller* v. *Ashford*, 133 U. S. 621, 33 L. Ed. 672, 10 Sup. Ct. Rep. 494; *Hendrick* v. *Lindsay*, 93 U. S. 143, 23 L. Ed. 855.

* * * * *

"It is contended that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute. But it is claimed that he, in fact, accepted no valid exemption, since it stands on a different footing from the grant of the land itself, and that, though the provision of non-taxability added to the value of the property. It can be withdrawn, because if not a gratuity, it is at least subject to the general rule that tax exemptions are to be strictly construed, and are subject to repeal unless the contrary clearly appears. *Welch* v. *Cook*, 97 U. S. 541, 24 L. Ed. 1112; *Christ Church* v. *Philadelphia County*, 24 How. 300, 16 L. Ed. 602; *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379, 48 L. Ed. 229, 24 Sup. Ct. Rep. 107; *Tucker* v. *Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *West Wisconsin R. Co.* v. *Trempealeau County*, 93 U. S. 595, 23 L. Ed. 814, are cited in support of this proposition. Some of these cases construe general statutes containing not a grant, but an offer of exemption to such com anies as should do certain work or build

certain lines of road before a given date. They hold that a statute making such an offer might be repealed even as against those companies which actually built in reliance to its terms. But these rulings are based on the theory that 'the legislature was not making promises, but framing a scheme of public revenue and public improvement.' (*Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 387, 48 L. Ed. 231, 24 Sup. Ct. Rep. 107.) The companies gave nothing, and the State received nothing in exchange for the offer.

* * * * *

"But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."

Choate v. *Trapp*, 224 U. S. 671, 56 L. Ed. 941.

From the foregoing it appears, first, there was a consideration moving from the Government to the Indian and *vice versa;* and, second, that the rule of construction, as applied to the Indian as a ward of the Government, should be liberal. How different is the case at bar! There is no consid-

eration moving from the Government to the plaintiffs in error, or *vice versa*, and the rule of construction, as applied to them, is and must be strict, and in favor of the taxing power of the State. The point we make is this: That so long as the Indian merely accepted the privileges granted to him by voluntary enactment of Congress, he waived none of his rights granted by prior Acts of Congress, but the minute he acted on the privilege granted him by Congress, and sold his land, he was bound by all the terms and conditions attached to that privilege. He could not accept the benefit conferred except upon the terms promulgated by Congress. He ceased at that minute to merely acquiesce in the benefits conferred, but became an active participant in the transaction and, as such, was bound by all the conditions attached to the privilege.

State v. *Wilson*, *supra*, is full authority for this contention, and the fact of Congress attempting to tax the land while in the possession of the Choctaw and Chickasaw Indians, does not alter the case. We submit that the two cases we have discussed, nor is the case of *English* v. *Richardson*, *supra*, inconsistent with our contention in the case at bar.

There is another phase of this case that we wish to direct to the attention of the court, and that is this: The plaintiffs in error are asking that valuable property be declared exempt from taxation. It is not in the same unimproved state that obtained when the lots were purchased from the grantee of Sarah Smith, and from Sarah Smith herself. Will the court say that these valuable improvements that have been placed on these lots shall escape taxation? By what reason or authority must the taxing power of the State be denied its right to assess and collect the taxes justly due on the improvements annexed to the property? Is it possible that a person may purchase a lot which he claims is exempt from taxation for a few dollars, and erect thereon an improvement costing thousands of dollars, and deny the State the right to tax the property? We do not think so. Such a construction of the law would be absolutely ruinous to the State.

It is well settled that where the title to land is acquired under a particular act, the grantee will not be permitted to assert a claim for exemption under a prior act.

Armstrong v. *Treasurer of Athens County*, 16 Pet. 281.

Lord v. *Town of Litchfield*, 36 Conn. 117.

Southwestern R. R. Co. v. *Wright*, 116 U. S. 231.
Wilmington & Weldon R. R. Co. v. *Allsbrook*, 146 U. S. 279.
Ford v. *Delta & Pine Land Co.*, 164 U. S. 662.
Platte v. *Rice*, 10 Watts 352.

Under the ruling in *Choate* v. *Trapp* the property rights under the Atoka Agreement rested in the allottees. In that case, as heretofore mentioned, the court was dealing solely with the right to tax these lands as the property of the Indians, and while Congress may not by subsequent statute arbitrarily abrogate the property right that vested in the Indian, the court in that case nowhere holds that the Indian may not by virtue of authority subsequently conferred by Congress voluntarily relinquish that right by his own action.

To apply the reasoning in the Choate case to the facts in this case is, in our opinion, wholly unwarranted and an injustice to the State.

This property has lost its identity as an Indian homestead. The rights of the Indian were wholly relinquished when conveyances were made by virtue of subsequent acts containing no provision for tax exemption.

In the Choate case the period of inalienability and non-taxability were not coincident. In this case, under the original and supplemental agreements, they were coincident.

Note the language of the court in that case:

> "The defendants' argument ignores the fact that, in this case, though the land could be sold after five years, it might remain non-taxable for sixteen years longer, *if the Indian retained title during that length of time.* Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years, and all except homestead after five years. *The period of exemption was not coincident with the five-year limitation.*"

Here, under the original and supplemental agreements, the Indian took a homestead which remained *inalienable and non-taxable for twenty-one years.* The limitation and exemption dependent one upon the other.

Under the original and supplemental agreements the Indian acquired no right to convey. The grantee in this case acquired no rights by virtue of those agreements. Also under the State Constitution the State's right to tax Indian land became fixed as soon as the Indian's title was extinguished.

Section 1 of the Enabling Act of the State of Oklahoma (Sec. 413, Williams' Const.) provided:

> "PROVIDED, that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any laws or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

The provisions of the Enabling Act were accepted by ordinance of the Constitutional Convention (Williams' Const., Sec. 409.)

Section 6, Article 10, of the Constitution, relating to exemption from taxation, provides:

> "and such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States Government, or by federal laws."

From the Enabling Act and the State Constitution it is apparent that so far as taxation of Indian lands is concerned, the only contract had with the State was not to impair such rights only "so long as such rights (what rights? Indian rights) remained unextinguished."

In other words, as soon as the rights the Indians acquired in lands or other property become extinguished, *i. e.*, that such property lost its identity as Indian property, the State was under no obligation not to tax it, but the sovereign power of the State to tax would then become immediately available.

In conclusion, we think this tax-exemption was personal to the Indian, just like the exemption provided by the same Act from the levy and sale under execution; that the exemption was provided by Act of Congress to throw additional safeguards around the Indian just as the exemption from levy and sale was a personal safeguard for the Indian; that one no more followed the land than the other; that when his land was sold neither the exemption from levy and sale, nor the exemption from taxation went with the land; that the purchaser acquired nothing more than the naked land; that he had no right to expect anything else for he was a party to the contract and the letter of the law barred him; that the tax exemption ran with the land only so long as the land was owned by the Indian; that the State never waived its right to tax the land after the land passed from the Indian; that the taxing laws of the State

must be construed strictly as against the plaintiffs in error, and that the petition of the plaintiffs in error should be denied, and the opinion of the Supreme Court of the State of Oklahoma affirmed, and the petition in error dismissed at the cost of plaintiffs in error.

Respectfully submitted,

R. E. SIMPSON,
County Attorney of Okmulgee County, Okla.,
S. P. FREELING,
Attorney General of the State of Oklahoma.
SMITH C. MATSON,
Assistant Attorney General,
R. E. WOOD,
Assistant Attorney General.
ATTORNEYS FOR DEFENDANTS.

SWEET ET AL. *v.* SCHOCK, TREASURER OF OKMULGEE COUNTY, STATE OF OKLAHOMA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 52. Argued November 15, 1917.—Decided December 10, 1917.

Under the Act of April 26, 1906, § 19, c. 1876, 34 Stat. 137, and the Act of May 27, 1908, § 4, c. 199, 35 Stat. 312, providing that allotments in the Five Civilized Tribes from which restrictions on alienation have been removed shall be subject to taxation, land allotted to a Creek Freedwoman as a homestead under the Act of June 30, 1902, c. 1323, 32 Stat. 500, lost its tax exemption when the restrictions were removed by the Secretary of the Interior upon the petition of the allottee under the townsite provision of the Act of March 3, 1903, c. 994, 32 Stat. 996. *Choate* v. *Trapp*, 224 U. S. 665, distinguished.

45 Oklahoma, 51, affirmed.

THE case is stated in the opinion.

Mr. Francis W. Clements, with whom *Mr. Herbert E. Smith*, *Mr. Wellington Lee Merwine*, *Mr. John L. Newhouse*, *Mr. Grant Foreman* and *Mr. James D. Simms* were on the briefs, for plaintiffs in error.

Mr. S. P. Freeling, Attorney General of the State of Oklahoma, with whom *Mr. Smith C. Matson* and *Mr. R. E. Wood*, Assistant Attorneys General of the State of Oklahoma, and *Mr. R. E. Simpson* were on the brief, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment of the Supreme Court of Oklahoma sustaining the taxation of lands which were

allotted to a Creek freedwoman under § 16 of the Allotment Act. 32 Stat. 500, c. 1323.

The suit was instituted by plaintiffs in error in the District Court of Okmulgee County to enjoin defendant in error, as treasurer of the county, from selling the lands and placing a penalty thereon or taking any steps towards collecting the taxes.

Plaintiffs in error are the owners of certain lots in the City of Okmulgee, Oklahoma, deriving title to the same through mesne conveyance from Sarah Smith, a freedwoman and citizen of the Creek Nation, to whom the lands had been patented as a homestead.

A certain part of the lands was conveyed by Sarah Smith to one Nathan Boyd and was by him surveyed, platted and laid out in blocks, lots and streets as the Capitol Heights Addition to the City of Okmulgee, and it is now a part of that city.

The remaining portion of the homestead land Sarah Smith also caused to be surveyed, laid out and platted in lots, blocks and streets as the Capitol Heights Second Addition to the City of Okmulgee.

The county board of commissioners placed the lots upon the tax duplicates of the county and refused to remove them therefrom upon petition of plaintiffs in error, who thereupon commenced this suit. Decree was entered for plaintiffs in error, which was reversed by the Supreme Court of the State.

The land allotted to Sarah Smith and laid out in lots as described was allotted to her by deed executed April 23, 1904, under the Acts of Congress of March 1, 1901, and June 30, 1902. 31 Stat. 861; 32 Stat. 500.

By the former act it was provided that the land should "be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years." By the latter act it was provided, in amendment of the other act, that the land should "be and remain non-taxable, inalienable,

and free from any incumbrance whatever for twenty-one years from the date of the deed therefor."

Both acts provided for the laying out of townsites under certain circumstances, and by the Indian Appropriation Act of March 3, 1903, 32 Stat. 996, it was enacted "that nothing herein contained shall prevent the survey and platting, at their own expense, of townsites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

Sarah Smith availed herself of these provisions, that is, she petitioned the Commission to the Five Civilized Tribes for the removal of the restrictions against alienation for the purpose of permitting her to sell part of the land for townsite purposes. The Commission, after investigation, made a report to the Secretary of the Interior, recommending the removal of the restrictions. The Indian Office concurred in the recommendation and granted the petition and authorized her to sell the land. Thereupon (February 28, 1907) she conveyed 1.69 acres of the land by warranty deed to one Nathan Boyd, as has been said, who platted the land deeded to him in town lots, and Sarah Smith, after July 26, 1908, so platted the remainder of the land, and plaintiffs in error derive title from her and him.

The contentions of the parties are quite accurately opposed and are in short compass. Plaintiffs in error contend that when the land was allotted to Sarah Smith non-taxability was given it by a valid act of Congress and accompanied the land to her grantees, and this in consideration of the surrender by her of the rights she had in common with other members of the Creek Tribe to the tribal lands. The opposing contention is that she devested the land of non-taxability by petitioning for and accepting

a right to alienate it. A determination between the contentions depends upon certain acts of Congress in addition to those we have mentioned, and their consideration and construction therefore become necessary.

The deed allotting the land to Sarah Smith, as we have seen, provided, in accordance with the act of Congress under which it was executed, that it should "be non-taxable and inalienable . . . for twenty-one years." It will be observed that the right (non-taxability), and the restriction (inalienability) were concomitants and necessarily they concerned alone the Indian, benefited her to the extent of the right, protected her by the extent of the restriction.

Accommodation to new conditions became necessary, and Congress, by an act passed March 3, 1903, hereinabove quoted, provided for the survey and platting of townsites out of allotted lands, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior, and permitted the "unrestricted alienation of lands for such purposes." A consequence of the exercise of the privilege so given was imposed by certain acts of Congress—(1) That of April 26, 1906, 34 Stat. 137, § 19 of which provides as follows: "That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee." (2) That of May 27, 1908, 35 Stat. 312, § 4 of which reads as follows: "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes; . . ."

It was after the passage of the Act of April 26, 1906, that Sarah Smith petitioned for the removal of the restrictions upon her homestead, that is, its alienation for townsite purposes, and conveyed to Boyd; and it was

after the passage of the Act of May 27, 1908, that she platted the land as stated. She and her grantees must, therefore, be deemed to have accepted the consequences of her acts, to-wit, that the land thereafter should be subject to taxation. And this is not taking from her or them a vested right; it is simply enforcing against her and them the results of a bargain, and, it may be presumed, a beneficial bargain.

The contention of plaintiffs in error overlooks the fact that the Commission to the Five Civilized Tribes and the Secretary of the Interior are instruments of the Government, delegated, it is true, to extend a privilege, but bound, in extending it, by the laws of the United States; that is, that they in granting it and Sarah Smith in accepting it did so under the conditions imposed by those laws; and *Choate* v. *Trapp*, 224 U. S. 665, is not opposed.

In that case it was decided that an Indian of one of the Five Civilized Tribes had an equitable interest in tribal lands which when given up constituted a consideration for his allotment and its exemption from taxation, and a law of the State of Oklahoma taxing the allotment while in possession of the Indians was declared invalid.

The acts of Congress, confirming previous agreements, provided that the lands allotted should be non-taxable while the title remained in the original allottee and provided for alienation within certain periods. The State argued nevertheless that there was in fact no tax exemption but that the provision for it was but an additional prohibition against a forced sale,[1] and that when restrictions against alienation were removed by the Act of Congress of 1908 (35 Stat. 312) the provision for tax exemption went as a necessary part thereof. The contention was rejected, and rightly so, and, as was aptly said by Mr.

[1] Section 16 of the Allotment Act (32 Stat. 500) contains a prohibition of any incumbrance or sale of allotted lands in satisfaction of any debt or obligation of the allottee.

Justice Lamar, speaking for the court: "The exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation." Under the circumstances it was a complete answer to the attempt which was made to make the right depend upon the limitation. And that, too, without the removal of the limitation being availed of by the Indian. As we have seen, to have availed himself of it would have relinquished the right, for by the express provision of the statute it only existed while the title remained in him.

The elements are different in the case at bar. Sarah Smith invoked a removal of the limitation, the restriction upon alienation, and could only receive the benefit of the law by accepting the consequences of the law. It would indeed have been anomalous to give her power to erect a town and convey its lots free from taxation.

New Jersey v. *Wilson*, 7 Cranch, 164, is adduced by plaintiffs in error to sustain their contention. That case passed upon a grant of the State of New Jersey to certain Indians, "with the privilege of exemption from taxation." It was decided that the privilege, though for the benefit of the Indians, was annexed by the terms which created it to the land itself, not to their persons. And this was an advantage to the Indians, it was said, "because, in the event of sale, on which alone the question could become material, the value would be enhanced by it." But it was further said it was not doubted that the State might have insisted on a surrender of the privilege as the sole condition on which a sale of the property should be allowed. Such condition is imposed by the acts of Congress which we have mentioned, when voluntarily invoked by an allottee. And there is no hardship in this. The right or privilege of exemption from taxation cannot be taken from an allottee's land while he retains the title. Its surrender may not be forced from him, but he may yield it in bargain for another right or privilege; and any

improvident estimate of the right to be given up or to be received is guarded against by the requirement of the approval by the Commission to the Five Civilized Tribes and the Secretary of the Interior. And it can easily be seen that if exemption from taxation gave value to the land, the power to constitute towns was of greater value. The record shows the value of the lots to plaintiffs in error in the erected town, ranging from $25 to $1700, a number being valued at $100, others at $200, $300, $400, and $1500. We may observe that Sarah Smith was authorized to sell for not less than $125 an acre.

Judgment affirmed.